Report on the legal status of the territory and inhabitants ...

United States. Division of Insular Affairs, Charles ...

REPORT

ON THE

LEGAL STATUS OF THE TERRITORY AND INHABITANTS OF THE ISLANDS ACQUIRED BY THE UNITED STATES DURING THE WAR WITH SPAIN, CONSIDERED WITH REFERENCE TO THE TERRITORIAL BOUNDARIES, THE CONSTITUTION, AND LAWS OF THE UNITED STATES.

BY

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WAR DEPARTMENT.

RESPECTFULLY SUBMITTED TO

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SECRETARY OF WAR,
Washington, D. C.

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WAR DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 12, 1900.

SIR: In response to your request, I have the honor to report upon the following questions of law:

1. Have the territorial boundaries of the United States been extended to embrace the islands of the Philippine Archipelago, the island of Guam, and the island of Puerto Rico?

2. Are said islands and their inhabitants bound and benefited, privileged and conditioned by the provisions of the Constitution of the United States?

3. Has the Congress of the United States jurisdiction to legislate for said islands and their inhabitants?

4. Must such legislation conform to the constitutional requirements regarding territory within the boundaries of the United States and citizens domiciled therein?

The power to extend or contract the territorial boundaries of the United States is vested in the political branch of our Government, to-wit, the two Houses of Congress acting with the approval of the Executive. It is not to be exercised by the President, either as Chief Executive or as commander in chief of the military forces. The territorial boundaries of the United States do not advance with its successful armies nor retire before an invading foe.

Fleming et al. v. *Page*, 9 How. (U. S.), 603.
United States v. *Rice*, 4 Wheat. (U. S.), 246.

The United States derives the right to acquire territory from the fact that it is a nation; to speak more definitely, a sovereign nation. Such a nation has an inherent right to acquire territory, similar to the inherent right of a person to acquire property.

American Ins. Co. v. *Canter*, 1 Peters, 542.
Mormon Church v. *United States*, 136 U. S., 1, 42.

In fact, the territory, i. e., the stretch of country, when acquired by conquest, treaty, or discovery, is at first a possession appertaining or property belonging to the United States. The subsequent erection therein of a political entity or government, whether State or Territorial, and the bestowal of citizenship upon the inhabitants are acts of grace on the part of the new owner or sovereign. Such acts of grace are sometimes stipulated for with the former sovereign, as was the case in the instances of Louisiana and Upper California, or omitted, as in the instance of the islands lately surrendered by Spain.

The opportunity to extend the boundaries of the United States may be afforded Congress by the successful conduct of a war by the Executive as the Commander in Chief of the Army and Navy, as in the war with Mexico; or by diplomatic negotiations, as in the instance of Louisiana; or by the proffer of the constituted authorities of the terri-

tory, as of Texas and the Hawaiian Islands, or by discovery, as of the Navassa Island; or by prior and long-continued occupation, as of Oregon.

The opportunity being afforded Congress, that body acts as its discretion determines. It may accept or reject as it sees fit. It was only after several years of deliberation that Congress completed the transfer of the Floridas, and utterly rejected the proffer of Santo Domingo.

Congress, having determined to accept the proffer of territory, may follow one of several procedures. In the instance of Texas the course pursued was to incorporate the existing State in the Union upon a footing of equality with the other States thereof. In the instance of the Hawaiian Islands the right was exercised by passing a joint resolution. In other instances the acquisition of territory was made by means of treaties duly negotiated and thereafter ratified by the Senate, approved by the Executive, an exchange of ratifications had and proclamation made, whereby the United States became bound and its national honor pledged to carry out the stipulations of the treaty. But in many respects a treaty is not self-operating.

It frequently happens that a treaty stipulates for that which can only be accomplished by Congressional enactment; in which case, Congress, i. e., the Senate and the House of Representatives, must exercise the powers of legislation in regard thereto, before such stipulation is effective. The ratification of a treaty by the Senate *creates* a contract but does not *execute* it. When a treaty requires legislative enactments before it can become operative it will take effect as a national compact, on being proclaimed, but it can not become operative as to the particular engagements until the requisite legislation has taken place.

Foster et al. v. *Neilson*, 2 Peters, 253, 314–5.
United States v. *Arredondo*, 6 Peters, 691, 734–735.
Op. Atty.-Gen., Vol. 6, p. 750. Also Id., p. 296.

The treaty with Great Britain, London, 1794, negotiated by Jay, during Washington's Administration, was the first concluded with a foreign power by the United States under its present form of government. After its ratification this treaty was communicated to Congress for the information and guidance of that body in preparing the legislation necessary to render the treaty effective. The House of Representatives took the position that the assent of that body was necessary to the *validity* of a treaty. This was controverted by President Washington, and receded from by the House. (Annals, first session, Fourth Congress, p. 759–772.) Subsequently a resolution was introduced in the House that provision for rendering the treaty effective should be made by law duly enacted. This gave rise to an animated debate, but the resolution passed by a vote of 51 to 48. (Annals, first session, Fourth Congress, 940.)

This question was also discussed in connection with the legislation for carrying into effect the treaty relating to the purchase of Louisiana. (Annals, 1st sess. 8th Cong.)

In 1816 the Senate passed an act to carry into effect the commercial convention of 1815 with Great Britain. The act provided that so much of any existing act as might be contrary to the provisions of the convention should cease to be of force and effect. The House passed an act, in several sections, enacting *seriatim* the provisions of the treaty. Each body refused to recede. The Senate claimed that the treaty was

operative of itself, and therefore the act should be declaratory only. The House insisted that legislation was necessary to carry it into effect. A conference committee agreed upon a bill which was then enacted. (3 U. S. Stat. L., 255.) The principle upon which an agreement was reached was reported to the House as follows:

> Your committee understood the committee of the Senate to admit the principle contended for by the House that while some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question how far such provision was necessary must be founded upon the peculiar character of the treaty itself. (Annals, 1st sess. 14th Cong., 36.)

The subject was again before Congress when the bill making appropriations for the purchase of Alaska was under consideration (1, 2, 3, 4, and 5, Globe, 2d sess. 40th Cong.), and was disposed of by the House accepting from a conference committee a preamble reciting that the stipulations of the treaty "that the United States shall accept of such cession * * * can not be carried into full force and effect except by legislation, to which the consent of both Houses of Congress is necessary." (15 U. S. Stat. 198.)

The report of the conference committee was adopted by the Senate and House of Representatives, and thereby Congress declares that the cession of territory to the United States must be effected by legislative enactment; that is, the assent of both Houses of Congress must be secured.

At the time the Constitution was adopted by the thirteen original States many of them claimed to own unoccupied territory, in some cases entirely detached from the State itself. These claims were in some instances conflicting. Several States claimed authority over the same area. The ownership of these western lands by individual States was distasteful to those States which did not share therein, mainly on the ground that the resources of the General Government, to which all contributed, were taxed for the protection and development of said regions, while the advantages inured to the benefit of but a few. On this ground several of the States refused to ratify the Constitution until this matter had been settled by the cession of these tracts to the General Government.

Moved by these arguments and by the consideration that the conflict of claims was pregnant with serious difficulties, Congress, by resolution of October 30, 1779, requested several of the States to forbear settling or issuing warrants or grants for said lands. This was transmitted to the different States. The several States claiming to own said lands responded to this request by transfers of the territory so claimed to the General Government. The first transfer was made by the State of New York, on March 1, 1781, and the last by the State of Georgia, April 24, 1802. A single instance will serve to show the course pursued. The general assembly of the State of North Carolina passed an act entitled "An act for the purpose of ceding to the United States of America certain western lands therein described."

Pursuant to the authority created by said act Samuel Johnston and Benjamin Hawkins, at that time United States Senators from North Carolina, executed a deed of cession of said lands to the United States and presented the same to the Senate of the United States. Thereupon the Senate and House of Representatives passed "An act to accept a cession of the claims of the State of North Carolina to a certain district of western territory." This act recited that "a deed of cession having been executed, and in the Senate offered for accept-

ance to the United States of the claims of the State of North Carolina, to a district of territory therein described, which deed is in the words following * * *

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That said deed be, and the same is hereby, accepted."

Approved, April 2, 1790. (1 U. S. Stat., chap. 6, pp. 106, 109.)

It would seem that if Congressional legislation were necessary to complete the incorporation of territory into the United States upon transfer from one of its component States, such Congressional action would be equally necessary where a transfer is from a foreign State.

That it is necessary to secure the assent of Congress in order that the territorial boundaries of the United States may be extended to include the islands ceded by the late treaty of peace with Spain (Paris, 1898), and that said treaty does not attempt to make such extension is made plain by a comparison of said treaty with other treaties of cession to the United States and the procedure followed in regard thereto.

The treaty for the cession of Louisiana contained the following stipulations (8 U. S. Stats. 200–202):

The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances. * * *

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.

(Articles 1 and 3, Treaty with France, 1803.)

The treaty of amity, settlement, and limits between the United States and Spain (1819), whereby was confirmed the title of the United States to the expanse of country known as East and West Florida, contains the following stipulations (8 U. S. Stat., pp. 254 and 256):

ART. 2. His Catholic Majesty cedes to the United States, *in full property* and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, known by the name of East and West Florida. * * *

ART. 6. The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty *shall be incorporated in the Union of the United States*, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.

In the treaty of 1848, whereby Mexico relinquished the expanse of country known as Upper California and New Mexico, resort was had to the simple plan of *designating the northern boundary of the Mexican Republic*. The reason for this was that the United States took the position that, having taken and occupied the capital of the Mexican Republic, its title was perfected by complete conquest, not only of Upper California and New Mexico, but of the entire Republic, and the question to be determined was how much should be restored by the United States, not how much should be ceded by Mexico. Being vanquished, Mexico was obliged to assent to the proposition, and hence the adoption of the plan followed. The treaty contained the following stipulation (9 U. S. Stat., 930):

ART. 9. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the

preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution.

The treaty with Mexico (1853), whereby the United States acquired the territory known as the "Gadsden Purchase," was, primarily, a stipulation as to boundary. Article 1 provided as follows (10 U. S. Stats., 1032):

The Mexican Republic agrees to designate the following as her true limits with the United States for the future:

Then follows an exact description of the location of the boundary line and how the same shall be surveyed and marked. Said article continues:

The dividing line thus established shall, in all time, be faithfully respected by the two Governments, without any variation therein, unless of the express and free consent of the two, given in conformity to the principles of the law of nations and in accordance with the constitution of each country, respectively.

The treaty with Russia (1867) whereby the United States acquired title to Alaska, contains the following stipulation (15 U. S. Stat., 539, 541, 542):

ART. 1. His Majesty the Emperor of all the Russias agrees to cede to the United States * * * all the *territory and dominion* now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit:

ART. 2. In the cession of *territory and dominion* made by the preceding article are included the rights of property of all public lots, * * * which are not private individual property.

ART. 3. The inhabitants of the ceded territory * * * shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. * * *

What was accomplished by article 1 of the treaty ceding Alaska, upon the treaty being ratified and exchanged, is stated by Dawson, J., as follows (29 Fed. Rep., 205):

Upon the ratification by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by His Majesty the Emperor of all the Russias, and an exchange of those ratifications * * * *the title of the soil* in Alaska vested in the United States.

United States v. *Nelson*, 29 Fed. Rep., 202, 205.

The expression "the title of the soil" as here used means the right of the sovereign or of *jus publicum*, not the right of a proprietor or of *jus privatum*.

The extension of the boundaries of the United States to include the Hawaiian Islands was accomplished by diplomatic negotiations, consummated by the passage by the Senate and House of Representatives and approval by the President of a joint resolution reciting (30 U. S. Stat., 750)—

That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, *annexed as a part of the territory of the United States* and are subject to the sovereign dominion thereof.

It would be a work of supererogation to follow in detail the numerous acts of Congress whereby the various provisions of these several treaties were carried into execution and the boundaries of the United States extended to include the territory to which the treaties related. In each instance, however, it was accomplished by something more

than entering into a treaty, although the manifest purpose and intent of the acquisition were to include such territory within our boundaries and such action was plainly contemplated in the treaties.

The stipulations of the treaty with France (Louisiana purchase, 1803) were made effective in and upon the United States by two acts of Congress. One was "An act to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the thirtieth day of April last; and for the temporary government thereof," approved Oct. 31, 1803. (2 U. S. Stats., 245.)

The other was "An act authorizing the creation of a stock, to the amount of eleven millions two hundred and fifty thousand dollars, for the purpose of *carrying into effect* the convention of the thirtieth of April, 1803, between the United States of America and the French Republic. * * *," approved Nov. 10, 1803. (2 U. S. Stats., 245.)

The act of October 31, 1803, was as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to take possession of and occupy the territory ceded by France to the United States by the treaty concluded at Paris on the thirtieth day of April last between the two nations; and that he may for that purpose, and in order to maintain in the said territories the authority of the United States, employ any part of the Army and Navy of the United States, and of the force authorized by an act passed the third day of March last, intituled "An act directing a detachment from the militia of the United States, and for erecting certain arsenals," which he may deem necessary; and so much of the sum appropriated for the purpose of carrying this act into effect to be applied under the direction of the President of the United States.

SEC. 2. *And be it further enacted*, That until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

Although Congress had thus legislated directly for Louisiana and the inhabitants of that country, President Jefferson did not consider the territory bound and benefited by the Constitution, nor the inhabitants entitled to the rights, privileges, and immunities guaranteed by the Constitution to the inhabitants of the United States. Upon the passage of the act of October 31, 1803, Jefferson sent commissioners to New Orleans to secure the transfer of possession. He also authorized one of the commissioners, Governor Claiborne, to exercise the powers theretofore possessed by the Spanish governor-general and the Spanish intendant of the territory. Under the Spanish régime the governor-general of the territory had almost royal authority. He promulgated ordinances which had the force of a statute, appointed and removed at pleasure commandants over local subdivisions of territory, and presided over the highest court. The intendant, however, was a counterpoise. He acted as a comptroller, and payments could be made by the public treasurer only on his warrant. He was also judge of the courts of admiralty and exchequer. (See Pub. Doc., 8th Cong., Abstract of Documents in the offices of the Department of State and of the Treasury, Nov., 1803, pp. 33–41.)

A code of laws, many of which were repugnant to the Constitution of the United States and the institutions of our Government, was left to be administered or superseded and replaced by others at the will of one man, an agent of the Executive. There was a religious establish-

ment. Two canons and twenty-five curates received salaries from the public treasury. (Pub. Doc., 8th Cong., Appendix 38.) All travelers previous to circulating any news of importance were bound to relate it to the syndic of the district, who was authorized to forbid its further circulation if he thought such prohibition would be for the public good. (Ibid., Appendix 71.) A son, whose father was living, could not sue without his consent, nor persons belonging to a religious order without that of their superior. (Ibid. Appendix 28.) A married woman convicted of adultery and her paramour were to be delivered up to the will of the husband, with the reserve, however, that if he killed one he must kill both. (Ibid. Appendix 46.) He who reviled the Savior or the Virgin Mary was to be punished by having his tongue cut out and his property confiscated. (Ibid. Appendix 45.)

The treaty with Spain (1819) confirming the claims of the United States to East and West Florida was ratified by the Senate February 19, 1821, and thereafter Congress passed "An act for carrying into execution the treaty between the United States and Spain," etc., approved March 3, 1821 (3 U. S. Stat., 637). The territory so acquired was also the subject of much other legislation and other official action by the political powers of our Government treating it as being within the boundaries of the United States, such as creating therein the State of Alabama by an act passed March 2, 1819, nearly two years prior to the ratification of the treaty. Indeed, the United States has never conceded that it derived *title* to the Floridas from Spain. "All that part of Alabama which lies between the thirty-first and thirty-fifth degrees of north latitude was ceded by the State of Georgia to the United States by deed bearing date the 24th day of April, 1802," and the remainder was acquired by the Louisiana purchase. (*Pollard's Lessee* v. *Hagan et al.*, 3 How., 212.)

The provisions of the treaty with Mexico (1848) relating to the northern boundary of the Mexican Republic were made effective as to the United States by legislation making appropriations:

> For expenses in running and marking the boundary line between the United States and Mexico, marking the examinations contemplated by the sixth article of the treaty of Guadalupe Hidalgo. * * *
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> 9 U. S. Stat. L., pp. 301, 541, 614. Id. 320, sec. 3.
> 10 U. S. Stat. L., pp. 17, 94, 149.

The purpose of the treaty between the United States and Spain (1898), as stated therein, was "to end the state of war now existing between the two countries." Being the victor, the United States dictated the terms and conditions upon which the war would end. The situation was in many respects the same as in the instance of the war with Mexico. The United States had captured and occupied the provincial capitals of Puerto Rico, the Philippines, and the island of Guam, and the Spanish forces therein had surrendered to the force of American arms, and these provinces were subject to military occupation by the American forces. This was a sufficient basis of good title for the United States. So long as the United States continued to hold and occupy said islands neutral nations must recognize the United States as possessed of sovereignty therein. As was said by the United States Supreme Court with regard to territory subjected to military occupation during the war with Mexico:

> It is true, that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possessions con-

tinued, as the territory of the United States, and to respect it as such; for, by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. * * * As regarded by all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our *established boundaries; but yet it was not a part of the Union*, for every nation which acquires terrritory by treaty or conquest holds it according to its own institutions and laws; and the relation in which the port of Tampico stood to the United States while it was occupied by our arms did not depend upon the law of nations, but upon our own Constitution *and acts of Congress*. (*Fleming* v. *Page*, 9 How., 603, 615.)

Such was the situation as regarded Puerto Rico, the Philippines, and Guam when the Peace Commission assembled in 1898. One requirement made by the American commission was that Spain should assume toward the islands mentioned the same position as was occupied by the other nations of the earth, which is that the territory belongs to the United States, "but yet it was not part of this Union," or "included in our established boundaries" since these were matters which depend upon "our Constitution *and the acts of Congress*."

At the time of the peace conference at Paris in 1898 all the rights of Spain in the islands mentioned had not been obliterated. The sovereignty of Spain therein had been displaced and suspended, but not destroyed. Theoretically, Spain retained the right of sovereignty, but the United States was in possession and exercising actual sovereignty. The rights of the United States were those of a belligerent and arose from possession and were dependent upon the ability to maintain that possession. Under the doctrine of postliminy the sovereignty and rights of Spain would become superior to those of the United States, if by any means Spain again came into possession of one or all of said islands. The American commission therefore required, as a condition precedent to a peace, that Spain surrender this right of repossession.

As regarded Cuba the situation was and remains different. The military forces of the United States had not captured Havana, the capital of the Spanish colony of Cuba, and only a relatively small portion of that island was subject to military occupation by our forces. In addition, the United States before invading Cuba had disclaimed any intention of acquiring any sovereign rights in said island. Therefore, the occupation of Cuba in whole or in part by the military forces of the United States, while it imposed duties, did not confer rights upon our Government. It follows that, at the time of the peace conference in 1898, the *title* of Spain to Cuba had not been divested by our military occupation. It was, therefore, necessary to require Spain to relinquish *title* in Cuba. This was done by the following provision in the treaty:

ART. 1. Spain relinquishes all claim of sovereignty over and *title* to Cuba.

But in the provisions of the treaty regarding the islands in which the United States had secured and was asserting rights of its own the language is different and the reference to *title* is omitted. To quote the exact words of the treaty:

ART. 2. Spain cedes to the United States the island of Puerto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam, in the Marianas or Ladrones.

ART. 3. Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following line:

The cession provided for by these articles is referred to five times in subsequent articles of the treaty as follows:

ART. 9. * * * the territory over which Spain by the present treaty relinquishes or cedes her sovereignty. * * *

ART. 10. The inhabitants over which Spain relinquishes or cedes her sovereignty shall be, etc.

ART. 11. The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be, etc.

ART. 12. Judicial proceedings pending * * * in the territories over which Spain relinquishes or cedes her sovereignty shall be, etc.

ART. 14. Spain will have the power to establish consular officers in the ports and places of the territories the sovereignty over which has been either relinquished or ceded by the present treaty.

It therefore seems that the word "cede," as used in this treaty, is to be given the meaning ascribed to it by ordinary usage, to wit, "To yield or surrender; to give up; to resign." (Webster's Dictionary.)

Consideration must also be given to the fact that nowhere in this treaty is mention or reference made of the territorial boundaries of the United States, either present or prospective; and to make "assurance doubly sure," the treaty provides:

ART. 9. * * * The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

It results from the foregoing that when this treaty was ratified by the Senate and approved by the Executive, these two agencies of our Government assented to the war ceasing and peace being established upon the condition (among others) that Spain assents to the rights secured by the United States by virtue of military occupation and abandons its right to regain the territory so occupied. In so doing, neither the Senate nor the Executive attempted to extend the territorial boundaries of the United States, nor to assent to such extension, for the proposition was in no wise involved. So that if the Senate or the Executive, acting alone or in conjunction, and without the concurrence of the House of Representatives, could extend or contract the territorial boundaries of the United States, it is sufficient to say that in this instance they have not attempted to exercise such power. The Senate placed itself on record by passing the following resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the citizens of the United States and the inhabitants of said islands.

As to the effect of action by the political branch of our Government regarding territory, the Supreme Court of the United States say (Marshall, Ch. J.):

If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession and which it claims under a treaty; *if the legislature has acted on the construction thus asserted*, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of a nation is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect *the pronounced will of the legislature*. (*Foster et al.* v. *Neilson*, 2 Peters, 253, 309.)

In a later case the court again assert this doctrine, and with reference to the announcement thereof in *Foster* v. *Neilson* say:

> This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow the other departments of the Government; that when individual rights depended on national boundaries * * * its duty commonly is to decide upon individual rights according to those principles which the *political departments of the nation have established.* * * * We think, then, however individual judges might construe the treaty of St. Ildelfonso, it is the province of the court to conform its decisions to the *will of the legislature, if that will has been clearly expressed.*
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> *United States* v. *Arredondo et al.*, 6 Peters, 691, 711.
> *Garcia* v. *Lee*, 12 Pet., 511, 520.

The effect of the treaty and the action thereon by the Senate and the Executive was to end the war. But the condition of the territory subject to military occupation as a result of that war was not changed by said treaty, except that it ceased to be a theater of actual war and the title of the United States was made incontestible.

Up to the present time the only powers of the United States which have been exercised in relation to these islands are the war powers. The confirmation of the treaty of peace was but the consummation of a war. But the military arm of our Government is without authority to extend the boundaries of the United States. In regard thereto the Supreme Court of the United States say:

> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As Commander-in-Chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. *But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.*
>
> *Fleming et al.* v. *Page*, 9 How., 614, 615.

The military arm of our Government deals with our enemies' territory as "property." Such territory is lawful prize of war and is seized and held, as the Supreme Court say, "in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war."

This is what has been done in the territory acquired by the United States in the late war with Spain. The President, having waged a war declared to exist by the Congress and having conquered a peace, presents to Congress the territory of said islands as so much property, seized as a spoil of war and to be dealt with by the sovereign people of the United States as shall be determined by that sovereign's will.

In United States *v.* Reynes the court say (9 How., 153, 154):

> The *legislative* and *executive* departments of the Government have determined that the entire territory was so ceded. This court have solemnly and repeatedly declared that this was a matter peculiarly belonging to the cognizance of those departments. (United States *v.* Reynes, 9 How., 127, 153–154.)

In Fleming et al. *v.* Page, the court further say (9 How., 616):

But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, *as previously established by the political authorities of the Government, was still foreign.*

Attention is directed to the fact that the legislative department of the United States Government has not taken action of any kind whatever in regard to the territory of the islands ceded by Spain. The Senate has advised the President to ratify the treaty of peace and terminate the war upon the terms set forth in the treaty. Being so advised the President ratified the treaty. (30 U. S. Stats., 1754.)

Since the ratification, the President and all the subordinate departments of the executive branch of our Government have treated said territory as being outside of the territorial boundaries of the United States.

Although these islands were outside the boundaries of the United States, they were territory appertaining to the United States, to which the sovereign people of the United States had acquired sovereign title, and in which said sovereign had secured many proprietary rights to property. It was therefore the duty of the President to use the means at his disposal to maintain the one and preserve the other. This duty is equally imperative should the emergency arise upon the high seas, or in territory recognized to be within the jurisdiction of another sovereignty. Therefore the discharge of such duty can not be interpreted as an assent to the extension of the territorial boundaries.

Apparently the position of the President is that the initial step in making known the will of the sovereign in regard to the extension of our boundaries to include this territory is to be taken by the legislative department, and the assent of the executive department to be evidenced by the approval of the acts of the legislative department by the President. This course is in harmony with the theory and established practices of our Government.

These islands have been affected by the *war* rather than the *treaty*. War wrought the changes, the treaty only confirms them.

The result of the war with Spain upon these islands was to destroy the jurisdiction of Spain therein and compel a withdrawal of Spanish sovereignty therefrom, leaving the islands in the possession of the United States. Thereupon they became land appertaining to the United States and in the possession of the United States, but not within the territorial boundaries of the United States.

There may be some question as to whether or not all the country within the territorial boundaries of the United States is bound and privileged by the provisions of the Constitution, but there can be no question that territory without the boundaries of the United States is not bound and privileged by our Constitution.

The United States Supreme Court say:

The Constitution can have no operation in another country.

In re Ross, 140 U. S., 453, 464, citing. *Cook* v. *United States*, 138 U. S., 157, 181.

This brings us to the question:

Has the Congress authority to legislate for territory appertaining to and in the possession of the United States but outside of the territorial boundaries?

This exact question was presented to the Supreme Court of the United States in three cases decided in 1890—*Jones* v. *United States*, *Smith* v. *United States*, and *Key* v. *United States* (137 U. S., 202). The territory involved was the Navassa Island, in the Caribbean Sea. The island is a small one, and wittily designated by a recent magazine writer on this subject as "an abandoned manure heap." But the cases presented to the Supreme Court involved the infliction of the death penalty on American citizens, than which no question the courts are called upon to decide is more solemn.

The court held:

The guano islands act of August 18, 1856, c. 164, reenacted in Revised Statutes, sections 5570–5578, is constitutional and valid.

The provisions of that law directly involved were as follows:

SEC. 5570. Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, *be considered as appertaining to the United States.*

SEC. 5576. All acts done, and offenses or crimes committed, on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States; and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws, for the purpose aforesaid, are extended over such islands, rocks, or keys.

The indictment charged that Henry Jones,

at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offenses, * * * an island situated in the Caribbean Sea and named Navassa Island, * * * and which was then and there recognized and considered by the United States as appertaining to the United States, and which was then and there in the possession of the United States, * * *

murdered one Thomas N. Foster.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. Trial was had, and the jury returned a verdict of guilty. Thereupon the defendant moved in arrest of judgment—

Because the act of August 18, 1856, C. 164, now codified with amendments as title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him.

The motion was overruled and the defendant sentenced to death. In affirming this sentence the court say (137 U. S., 212):

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. (Vattel, lib. 1. c. 18; Wheaton on International Law, 8th ed., §§ 161, 165, 176, note 104; Halleck on International Law, C. 6, §§ 7, 15; 1 Phillimore on International Law, 3rd ed., §§ 227, 229, 230, 232, 242; 1 Calvo Droit International, 4th ed., §§ 266, 277, 300; Whiton *v.* Albany Ins. Co., 109 Mass., 24, 31.)

When Spain elected to go to war rather than withdraw from Cuba, she subjected the sovereignty and dominion of her entire realm to the

hazard of that war, and by the laws of war and of nations she made it lawful for her adversary to invade any part of her domain and displace her sovereignty, exclude her jurisdiction, and destroy her dominion; in other words, effect a complete conquest. So much of her domain as became so situated was without the jurisdiction of Spain and within the possession of the United States. As to the United States, such territory was the same as land newly discovered and occupied by citizens of the United States, with this difference, the occupier was a military force of the United States sent there by the nation itself, instead of a private citizen and pioneer adventurer.

The sovereignty and jurisdiction of the United States have attached to the territory embraced in a number of islands, under the act of August 18, 1856, as will appear from the following correspondence on file in the Treasury Department:

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, D. C., September 16, 1893.

Hon. S. WIKE,
Assistant Secretary of the Treasury.

SIR: In compliance with the request contained in your letter of the 15th instant, I have the honor to transmit herewith a list of the guano islands bonded under the act of August 18, 1856, as appears from the bonds on file in this office up to the present date. You will observe that the list is the same as that transmitted with letter from this office, dated December 22, 1885, no additional bonds having been received since that date.

Respectfully, yours,

R. S. BOWLER,
Comptroller.

1 inclosure.

List of guano islands, appertaining to the United States, bonded under the act of August 18, 1856, as appears from bonds on file in the office of the First Comptroller of the Treasury, September 16, 1893.

Number of bond.	Date of bond.	Name of island.	Latitude.				Longitude.			
			°	′	″		°	′	″	
1	Oct. 28, 1856	Bakers, or New Nantucket	0	15	00	N	176	30	00	W
2	....do	Jarvis	0	21	00	S	159	52	00	W
3	Aug. 31, 1858	Navassa	18	10	00	N	75	00	00	W
4	Dec. 3, 1858	Howland, or Nowlands	0	52	00	N	176	52	00	W
5	Sept. 6, 1859	Johnsons Islands								
6	Dec. 27, 1859	Barren, or Starve	5	40	00	S	155	55	00	W
		Enderbury	3	08	00	S	171	08	00	W
		McKean	3	35	00	S	174	17	00	W
		Phœnix	3	47	00	S	170	35	00	W
7	Dec. 29, 1859	Christmas	1	58	00	N	157	10	00	W
8	....do	Maldens Islands	4	03	00	S	155	00	00	W
9	Feb. 8, 1860	America Islands	3	40	00	N	159	28	00	W
		Annes	9	49	00	S	151	15	00	W
		Barbers	8	54	00	N	178	00	00	W
		Baumans	11	48	00	S	154	10	00	W
		Birnies	3	35	00	S	171	39	00	W
		Caroline	9	54	00	S	150	07	00	W
		Clarence	9	07	00	S	171	40	00	W
		Dangerous Islands	10	00	00	S	165	56	00	W
		Dangers Rock	6	30	00	N	162	22	00	W
		Davids	0	40	00	N	170	10	00	W
		Duke of York	8	30	00	S	172	10	00	W
		Enderburys	3	08	00	S	174	14	00	W
		Farmers	3	00	00	S	170	50	00	W
		Favorite	2	50	00	S	176	40	00	W
		Flint	10	32	00	S	152	05	00	W
		Flints	11	26	00	S	151	48	00	W
		Frances	9	58	00	S	161	40	00	W
		Friedhaven	10	00	00	S	156	59	00	W
		Gardners	4	40	00	S	174	52	00	W
		Gallego	1	42	00	N	104	05	00	W
		Ganges	10	59	00	S	160	55	00	W

List of guano islands, appertaining to the United States, bonded under the act of August 18, 1856—Continued.

Number of bond.	Date of bond.	Name of island.	Latitude.				Longitude.			
			°	′	″		°	′	″	
9	Feb. 8, 1860	Groninque	10	00	00	S	156	44	00	W
		Humphreys	10	40	00	S	160	52	00	W
		Kemuns	4	41	00	S	173	44	00	W
		Lideron	11	05	00	S	161	50	00	W
		Low Islands	9	33	00	S	170	38	00	W
		Mackin	3	02	80	N	172	46	00	W
		Mary Letitias	4	40	00	S	173	20	00	W
		Marys	2	53	03	S	172	00	00	W
		Mathews	2	03	00	N	173	25	00	W
		Nassau	11	30	00	S	165	30	00	W
		Palmyros	5	48	00	N	162	20	00	W
		Penhuyns	8	55	00	S	158	07	00	W
		Pescado	10	38	00	S	160	20	00	W
		Phœnix	3	40	00	S	170	52	00	W
		Prospect	4	42	00	N	161	38	00	W
		Quiros	10	32	00	S	170	12	00	W
		Riersons	10	10	00	S	160	53	00	W
		Rogeweins Islands	11	00	00	S	156	07	00	W
		Samarang Islands	5	10	00	N	162	20	00	W
		Sarah Anne	4	00	00	N	154	22	00	W
		Sidneys Islands	4	20	00	S	171	00	00	W
		Starbuck or Hero	5	25	00	S	155	56	00	W
		Stavers	10	05	00	S	152	16	00	W
		Walkers	3	58	00	N	149	10	00	W
		Washington or Uahuga	4	40	00	N	160	07	00	W
10	Dec. 30, 1862	Great and Little Swan Islands in the Caribbean Sea.								
11	Aug. 12, 1868	Islands in Caribbean Sea not named on bond								
12	Nov. 22, 1869	Pedro Keys, Quito Sereno, Petrel, Roneador								
13	Sept. 8, 1879	Serranilla Keys, viz: East Key, Middle Key, Beacon Key	15	20	00	N	79	40	00	W
		Morant Keys, viz: Northeast Key, Sand Keys, Savanna Key, Seal Key	17	26	00	N	77	55	00	W
		Arenas Key	22	07	10	N	91	24	30	W
14	Sept. 13, 1880	De Aves	15	40	00	N	63	37	00	W
		Serranilla Keys	15	20	00	N	79	40	00	W
		Western Triangles	20	54	00	N	92	13	00	W
15	Oct. 18, 1880	Island of Arenas	22	24	30	N	91	24	30	W

CIRCULAR.—GUANO ISLANDS NOT APPERTAINING TO UNITED STATES.

[1894.—Department No. 176.—Bureau of Navigation.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., November 21, 1894.

To Collectors of Customs and others:

At the request of the Secretary of State, the following-named "guano islands," specified in lists issued by this Department of guano islands appertaining to the United States, will be considered as stricken from said list, and no longer included among the guano islands bonded by the United States under the Act of August 18, 1856, viz:

Arenas,
Perez,
Pajoras,
Chica,
Arenas Key,
Western Triangles.

S. WIKE, *Assistant Secretary.*

The sovereignty of the United States is not confined within territorial boundaries. Broadly speaking, it is coextensive with the world. By virtue of its sovereignty the United States acquires the right to recognition as a member of the family of nations, with all the rights and privileges appertaining to such relationship. It may wage war in foreign territory, traverse the high seas, and protect its citizens and flag wherever found. It may also acquire rights outside of the boundaries of the territory belonging to it, both peaceably and forcibly, as, for instance, the right to move its troops through foreign terri-

tory, construct ship canals, control harbors, establish coaling stations, consulates, and other agencies of commerce. Take the instance of the acquisition of land in a foreign capital by the United States upon which to erect an embassy. Such land would belong to the United States, its sovereignty would attach thereto and its flag float thereover by sovereign right; but it would not follow that said land was territory bound and benefited by the provisions of our Constitution, and that a person setting foot on said premises would secure the right of unrestricted locomotion throughout the United States, or that goods brought upon the premises were subject to the customs tariffs of the United States.

The *sovereignty* of the United States "follows the flag" wherever the flag is raised by the authority of that sovereignty, whether the raising is accomplished by a discoverer, an ambassador, or a military commander, but the territorial boundaries of the United States do not until appropriate action has been taken by Congress.

The usage of the world is that territory title to which is acquired by conquest and the acquisition confirmed by treaty of peace is to be dealt with by the new sovereign according to the terms of the treaty, or, in the absence of treaty stipulations, upon such terms as the new sovereign shall impose.

The new sovereign in the instance with which we have to deal is the sovereign people of the United States. That sovereign has conferred upon Congress the authority to impose the terms and prescribe the means of accomplishing the purposes of government in all places to which its sovereignty attaches, or subject to its jurisdiction, and as to all property to which it has rights. (Art. 4, sec. 3, Const.) In the exercise of this authority, Congress, with the approval of the Executive, may extend the boundaries of the United States to include this island territory.

If Congress should extend the boundaries of the United States to include these islands, it may thereafter continue them in the condition of property by allowing them to remain unorganized territory, as was done with Oregon and other parts of the West for many years. Or Congress may create in said territory a political entity which we call a "State," and admit it into the Union of States, with the powers possessed by the other component States, as was done with California. Or Congress may erect in said territory the political entity known as a "Territory," and possessed of such powers as Congress sees fit to confer upon it, as has been done in many instances throughout our history.

The important matter to be now determined is, *shall the boundaries of the United States be extended to include any or all of the islands of Puerto Rico, Philippine Archipelago, and Guam.*

The determination must be made by Congress and approved by the Executive.

This extension of boundaries may be accomplished directly by express legislation in regard thereto, as in the instances of Hawaii and Florida, or indirectly by legislation of such kind and character that the purpose to make such extension is established by necessary intendment, as in the instances of Louisiana, California, and Texas.

One of the first acts of the first session of the Congress of the United States imposed the penalty of death for robbery and kindred offenses committed on the "high seas" or any river, haven, basin, or

bay, out of the jurisdiction of any particular State." (Sec. 8, chap. 9, Act approved April 30, 1790; 1 Stats., 113.)

The United States Supreme Court held this act to be constitutional, and applied to foreigners when the offense was committed on board a vessel of the United States, or to any person committing the offense on a vessel which had no national character.

United States v. *Furlong*, 5 Wheat., 184.
United States v. *Holmes*, 5 Wheat., 412.
United States v. *Klintock*, 5 Wheat., 144.

In 1820 the Congress of the United States passed an act which provided that—

> Every person who, being of the crew or ship's company of any foreign vessel engaged in the slave trade, * * * lands from such vessel, and, on any foreign shore, seizes any negro or mulatto with intent to make such negro or mulatto a slave, * * * is a pirate, and shall suffer death. (See sec. 5376, Rev. Stats. U. S.)

This act was directed against the practice of seizing the inhabitants of Africa and converting them into slaves. It was an assertion of world-wide sovereignty, and illustrates the doctrine that the sovereignty of a nation terminates only where the prior rights of another recognized sovereignty begin, and may attach itself to any land or territory not within the jurisdiction of a recognized sovereignty.

It is only necessary to call attention to the legislation of Congress regarding the many persons and matters subject to the maritime and admiralty jurisdiction of the United States, to establish that Congress has extraterritorial powers of legislation. *Extraterritorium* means beyond or outside of the territorial limits of a state (6 Binn., 353), and by extraterritorial powers of legislation is meant the authority to create legislation which will operate upon persons, rights, or laws beyond the limits of the state, but which are still amenable to its laws.

These powers are not confined to the seas. By treaties or other international agreements, upon principles of the comity of nations and the usages of the world, the sovereign people of the United States acquire many rights to trade in the territory and with the inhabitants of other nations. When acquired, these rights belong to the sovereignty of the United States, and are sovereign rights, the exercise of which may be and are regulated by Congressional legislation. The same is true of our relations with foreign governments as maintained and conducted by our representatives and instrumentalities in foreign lands. They remain within the jurisdiction and subject to the sovereignty of the United States, although without its territorial boundaries. The exact rule is that *wherever the sovereignty of the United States may be asserted, the Congress of the United States may prescribe the ways and means, the manner and methods by which such sovereignty is to be asserted.*

The determination of the question where the sovereignty and jurisdiction of the United States is to be asserted, is to be made by the Congress and the Executive. It is a political question, and calls for the exercise and powers possessed by the political branch of the Government. In United States *v.* The James G. Swan, the court say:

> As our Government is constituted, the President and Congress are vested with all the responsibility and powers of the Government for the determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature, and not judicial. The Congress and the President having

assumed jurisdiction and sovereignty, and having made declarations and assertions as to the extent of our national authority and dominion above indicated * * * all the people and courts are bound by such governmental acts, declarations, and assertions * * * and the responsibility of maintaining the national authority within the boundaries so fixed, and to the extent asserted by the executive and legislative authority against foreign governments, rests with the executive and legislative branches of the Government. (*United States* v. *The James G. Swan*, 50 Fed. Rep., 108, 111.)

With reference to the same question, the United States Supreme Court say (137 U. S., 212):

Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. (See authorities cited.)

Continuing the discussion, the court say (p. 214):

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of the foreign power, as appearing from the public acts of the legislature and the executive. (See authorities cited. *Jones* v. *United States*, 137 U. S., 202, 212, 214.)

The legislation enacted by Congress regarding consular courts (Title 47, p. 783, U. S. Rev. Stats.) conferring jurisdiction thereon and regulating procedure therein, is also an example of the exercise of its power of extraterritorial legislation by Congress. This legislation was sustained by the United States Supreme Court in a case wherein a man had been convicted and sentenced to death by the American consular tribunal in Japan. (*In re* Ross, 140 U. S., 453.) The case was as follows: John M. Ross, a seaman of the American ship *Bullion*, was charged with murder, committed on board said ship while in the harbor of Yokohama, Japan. He was placed on trial before the consul-general of the United States at Kanagawa, Japan, sitting as a court in that place, in pursuance and by authority of the statutes of the United States for that purpose made and provided. He was not indicted by a grand jury, but a complaint in writing was filed in said tribunal. The accused demanded a trial by jury, which was denied, and the court proceeded to hear and determine the case without a jury, entered judgment of conviction, and sentenced the accused to be hanged. The President of the United States commuted this sentence to life imprisonment in the penitentiary at Albany, N. Y.

After being incarcerated in said prison for nearly ten years, Ross applied to the circuit court of the United States for the northern district of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence, and imprisonment were unlawful, and stating the causes thereof and attendant circumstances. The writ was issued directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President, a copy of which was annexed. The circuit court after full consideration of the subject, entered an order denying the motion for discharge and remanding the prisoner to the penitentiary. From that order an appeal was taken to the United States Supreme Court. Therein it was contended that the United States consular court by which he was tried was without jurisdiction of his person, because he was not a citizen of the United States and was a subject of Great Britain. That said consular court was without jurisdiction of the offense charged

because it was committed aboard a vessel of the United States on the high seas, and by the laws of the United States, such offenses so committed, were to be tried in the United States before its domestic tribunals. That if it were held that the offense was committed in Japan and not upon the high seas, then, the prisoner insisted, that—

The statutes creating the consular courts, as well as the treaties under which they are instituted and from which they derive such authority and jurisdiction as they possess, expressly subject that jurisdiction to the laws of the United States.

The claim that the Constitution has no extra-territorial force is disproved by the existence and operation of the consular court itself.

The refusal to allow the accused a trial by jury was a fatal defect in the jurisdiction exercised by the court, and renders its judgment absolutely void. (See 140 U. S., 460.)

The holding of the court, as stated in the syllabus, is as follows:

By the Constitution of the United States a government is ordained and established "for the United States of America," and not for countries outside of their limits; and that Constitution can have no operation in another country.

The laws passed by Congress to carry into effect the provisions of the treaties granting extraterritorial rights in Japan, China, etc. (Rev. Stats., §§ 4083–4096), do no violation to the provisions of the Constitution of the United States, although they do not require an indictment by a grand jury to be found before the accused can be called upon to answer for the crime of murder committed in those countries or to secure to him a jury on his trial.

Regarding the authority of Congress to legislate for territory without the boundaries of the United States, the court in the body of the opinion say:

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial secured by the Constitution to citizens of the United States at home should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offense of that grade committed in those countries, or to secure a jury on the trial of the offense. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.

The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, can not invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable, from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guaranties in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and

tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guaranties of the Constitution against unjust accusation and an impartial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. (In re Ross, 140 U. S., 463, 465.)

The right of Congress to confer jurisdiction in civil matters upon consular courts was declared to exist by the United States Supreme Court in *Dainese* v. *Hale*, 91 U. S., 13.

The constitutionality of Congressional legislation regarding consular courts is discussed and sustained in the following cases: *Mahoney* v. *United States* (10 Wall., 66, 67); *In re Joseph Stupp* (11 Blatchford, 124); *United States* v. *Craig* (28 Fed. Rep., 801), (opinion by Justice Brown); *United States* v. *Smiley* (6 Saw., 645), (opinion by Justice Fields); *Steamer Spark* v. *Lee Choi Chum* (1 Saw., 713); *Tazaymon* v. *Twombly* (5 Saw., p. 79); *The Pingon* (7 Saw., 483); *The Pingon* (11 Fed. Rep., 607).

Pursuant to the provisions of title 47, sections 4083 to 4130, the United States is maintaining consular courts in the following countries: China, Korea, Maskat, Morocco, Persia, Samoa, Siam, Tonga, Turkey, and Zanzibar.

This Government also maintained consular courts in Japan up to July 17, 1899, when the new treaty with Japan, which abolished these courts, went into effect.

The right of legislation in regard to consular courts in territory within the jurisdiction of a recognized sovereignty with which the United States maintains foreign relations is to be exercised in accordance with existing treaty stipulations in regard thereto. But the right is not created by the treaty, but is simply regulated thereby. Consular courts are instituted and maintained in countries subject to the dominion of semicivilized or barbarous people whose chieftains we do not recognize as possessing sovereign powers and with whose government we do not make treaties nor maintain foreign relations.

Section 4088, Revised Statutes of the United States, is as follows:

> The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people or recognized by any treaty with the United States are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of one thousand dollars, exclusive of costs, and, upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections forty hundred and eighty-six and forty hundred and eighty-seven for trial of offenses or misdemeanors.

Regarding this section Attorney-General Garland said:

> The jurisdiction thus conferred is based upon the well-received doctrine of international law that consuls in barbarous or semibarbarous States are to be regarded as investing with extraterritoriality the place where their flag is planted, and if justice is to be administered at all, so far as concerns civilized foreigners visiting such States, it must be by tribunals such as are named in section 4088, Revised Statutes. (18 A. G. Op., 219, 220.)

The United States has acquired and still retains certain rights in the Samoan Islands. Wharton's International Digest, Vol. I, sec. 63, contains the following:

> In March, 1872, certain commercial arrangements were made by Manga, chief of

Tutuila, and Commander Meade, of the U. S. S. *Narragansett*, for the use of the port of Pango-Pango. According to a summary in the Nineteenth Century for February, 1886, "It was arranged that Pango-Pango should be given up to the American Government, on condition that a friendly alliance existed between that island and the United States. Pango-Pango Harbor has thus passed forever from the hands of the British."

The rights so acquired were subsequently confirmed by treaty between the United States and the Government of the Samoan Islands (January 17, 1878). Article II of said treaty is as follows:

> Naval vessels of the United States shall have the privilege of entering and using the port of Pango-Pango, and establishing therein and on the shores thereof a station for coal and other naval supplies for their naval and commercial marine, and the Samoan Government will hereafter neither exercise nor authorize any jurisdiction within said port adverse to such rights of the United States or restrictive thereof.

Although Congress has legislated as to how and by what means the rights secured by the United States in the Samoan Islands are to be exercised, it has never been claimed that the boundaries of the United States had been extended or included any of the territory constituting the Samoan Islands. The reason for this is, that neither by direct legislation or necessary intendment has Congress ever manifested its assent to such extension.

The right of Congress to create extraterritorial legislation is based upon the fact that a citizen of the United States passing without our territorial boundaries is not thereby divested of the allegience he owes this Government nor the privileges and obligations arising therefrom. Wherever he goes he is entitled to call for and receive the protection of the sovereignty of the United States. This protection is to be afforded to such extent and in such manner and form as shall seem adequate and proper to that sovereignty. Under our form of government the authority of declaring the will of the sovereign—i. e., the people of the United States—is vested in Congress. This privilege of protection by his sovereign enjoyed by a citizen carries with it an obligation on his part to respect the will of his sovereign; that is, to obey its laws. If he refuses to respect this obligation, the sovereign may reach out to punish him as it is bound to do to protect him. The will of the sovereign of the United States in regard thereto is made known by Congress. Here, again, Congress acts in harmony with treaty stipulations, if any exist, but the right to enforce sovereign authority over its citizens is not created by treaties.

This brings the discussion to the question, Are the inhabitants of said islands "citizens" of the United States? If by "citizen" is meant "a member of the civil state, entitled to all its privileges," the question must be answered in the negative, for even in the treaty it is provided that "the civil rights and political status * * * shall be determined by the Congress" (Art. 9), and Congress has not yet made such determination. Nor do they fulfill the requirements of the fourteenth amendment to the Constitution, for while they are subject to the jurisdiction of the United States, they are not "persons born or naturalized in the United States."

If by "citizen" is meant one who owes allegiance to our Government in return for the protection which the Government affords him, then the inhabitants are citizens of the United States.

That the inhabitants of these islands are entitled to call upon the United States to protect them in their rights of property and person, preserve the public peace, maintain law and order, and prevent en-

croachments upon the territory by foreign nations can not be denied. Correlatively the inhabitants owe allegiance to the sovereignty and obedience to the laws whereby the sovereignty undertakes to discharge the obligation.

The sovereignty and jurisdiction of the United States having attached to said islands, persons continuing therein are subject to the laws put in force therein by the United States, without regard to their citizenship, with such exceptions as are in force in other territory subject to the jurisdiction of the United States.

Regarding the citizens of the United States who were domiciled in the town of Castine, while subject to military occupation by the forces of Great Britain during the war of 1812, the United States Supreme Court say (*United States* v. *Rice*, 4 Wheat., 247, 254):

> By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience.

Certainly the sovereignty of the United States may enforce against the subjects of another sovereignty a rule it is willing to apply to its own citizens.

Regarding the powers of Congress over Alaska, Dawson, J., said (29 Fed. Rep., 205):

> Possessing the power to erect a Territorial government for Alaska, they could confer upon it such powers, judicial and executive, as they deem most suitable to the necessities of the inhabitants. *It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska the power to legislate and make laws.* In the absence, then, of any *law-making power in the territory*, to what source must the people look for the laws by which they are to be governed? This question can admit of but one answer. Congress is the only law-making power for Alaska. (*United States* v. *Nelson*, 29 Fed. Rep., 202, 205–206.)

In speaking of the powers of Congress in legislating for territory subject to the jurisdiction of the United States, but outside of the jurisdiction of any one of the States of the Union, the circuit court of appeals, ninth circuit, say:

> It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. (Endleman *v.* United States, 86 Fed. Rep., 456, 459.)

In *Snow* v. *United States* (18 Wall., 319) the court say:

> The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories they are mere dependencies of the United States. *Their people do not constitute a sovereign power.* All political authority exercised therein is derived from the General Government.

From the foregoing it seems manifest that the legislative powers of Congress are coextensive with the authority of the United States, and that in legislating for territory and individuals without the boundaries of the United States Congress need not conform to the constitutional requirements regarding territory within the boundaries of the United States and citizens domiciled therein.

With the light of these interpretations afforded us by judicial decision and Congressional action, let us examine the Constitution itself:

Article 1, section 8, of the Constitution confers upon Congress the power—

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

It can not be seriously contended that the high seas are within the territorial boundaries of the United States.

The people of the United States, in adopting this provision, recognized the fact that the sovereignty of the United States was world-wide, and that such sovereignty could attach itself, and secure jurisdiction to exercise authority at any point without the jurisdiction of another recognized sovereignty.

The provision regarding "Offenses against the law of nations" is a similar recognition. By the law of nations, when an invading army has driven out the opposing sovereign and overthrown the existing government, the invader is bound to replace said government by one of his own. The Brussels project of an international declaration concerning the laws and customs of war provides as follows:

ART. 2. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to reestablish and secure, as far as possible, public safety and social order.

See also section 43, Recommendations of Institute of International Law, Oxford Session, 1880; section 1, Lieber's Instructions for the Government of Armies of the United States in the Field. (G. O., 100, A. G. O., 1863.)

In ancient times governments of this character were administered according to the accepted doctrine: "The will of the conqueror is the law of the conquered." This doctrine is still recognized as a law of nations, but has been so modified by modern usage as to deprive it of its terrors. Without stopping to discuss these modifications, attention is directed to the fact that in the instance with which we have to deal, the "conqueror" is the sovereign people of the United States. Under the distribution of powers made by that sovereign its "will" is to be made known by its Congress.

Inasmuch as the people of the United States, *i. e.*, the sovereign of the United States, is required to establish government in such territory, any interference or obstruction by the inhabitants seeking to prevent the discharge of this obligation would be an offense against the law of nations, unless persons taking such action are "in arms" by authority of and in defense of the prior sovereignty.

Article 1, section 8 of the Constitution, also confers upon Congress the authority—

To declare War, grant Letters of Marque and Reprisal and make Rules concerning Captures on Land and Water;

Until Congress shall change their character and condition the islands under consideration will remain "Captures," the possession of which by the United States has been confirmed by the treaty of peace. "Captures" only in the sense that they are to be legislated for by the Congress of the United States, whose enactments have been of such character that the country and people heretofore subject thereto are the envied of enlightened humanity less favorably circumstanced.

Article 4, section 3, of the Constitution provides that—

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

This clause was drafted by Gouverneur Morris. Fifteen years after the adoption of the Constitution, in answer to a question as to the precise meaning of this clause, he wrote:

I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. (3 Morr. Wr., p. 192.)

Regarding this clause in the Constitution the Supreme Court say (14 Peters, 537):

The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the Territorial governments rest. (*United States* v. *Gratiot et al.*, 14 Pet., 524, 537.)

The decisions of the courts uniformly sustain the doctrine that by this provision of the Constitution Congress is given the power to govern those portions of the public domain lying outside of the boundaries of the several States of the Union, in the manner and by the means which to Congress seems best adapted to existing conditions, ranging from a joint protectorate, such as is exercised over Samoa, to a Territorial government of well-nigh sovereign power, such as exists in Oklahoma.

Returning to article 1, section 8, we find that Congress is thereby empowered—

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

The Constitution specifically vests in the Government of the United States the authority to engage in war. If it is conceded that when engaged in war the United States is bound by the law of nations regulating civilized warfare, it follows that its first and paramount duty is to compel a peace, and for this purpose it may wrest from its adversary all and every means of continuing the warfare. This includes not only guns and ships, but public revenues and other property, the allegiance and support of subjects, territory, dominion, and sovereignty. Having wrested any or all these from its adversary and reduced them to its own possession, the laws of nations, the interests of civilization, and the dictates of humanity all impose duties and obligations in regard thereto upon the Government of the United States. By what means the duties and obligations so arising from the acquisition of the islands under consideration are to be discharged, and the general principles governing the use of said means, has already been discussed herein.

That the sovereignty of the United States would attach to territory without its territorial boundaries, that jurisdiction over such territory would be attained thereby, and that Congress would be required to legislate therefor, is plainly recognized and asserted in the thirteenth amendment to the Constitution, as follows:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation."

What is meant by "any place subject to their jurisdiction," if not such territory as that with which we have now to deal? If said language was intended to designate those portions of our country in which Territorial governments were established, it follows that the other sections of the Constitution, from which said clause is omitted, are not in force in the "Territories," and Congress may extend the boundaries of the United States to include said islands, erect Territorial governments therein, and legislate therefor, without such legislation being subject to the provisions of the Constitution, or the territory or the inhabitants being entitled to the benefits, privileges, and immunities created by the Constitution.

Regarding the exercise of these great powers, the United States Supreme Court say:

> Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. (*United States* v. *Fisher*, 2 Cranch, 358.)
>
> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. (*M'Culloch* v. *Maryland*, 4 Wheat., 316; *Prigg* v. *Pennsylvania*, 16 Pet., 539.)
>
> If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. (*M'Culloch* v. *Maryland*, 4 Wheat., 316.)

If these islands and their inhabitants are without the ægis of the Constitution, what then is their protection from an oppressive government and unjust laws? The answer is plain. Such protection is found in the character and enlightenment of the new sovereign within whose jurisdiction they now are, to wit, the sovereign people of the United States. They are a charge upon the conscience of that sovereign, and the "inalienable rights" of a people are safe in that custody even when not guaranteed by the letter of the Constitution, for they are protected by laws higher than the Constitution, being the laws of American civilization, the moral sentiment of the nation pervading all our institutions and from which even the Constitution derives its force.

In *Johnson* v. *McIntosh* (8 Wheat., 589) the United States Supreme Court, speaking by Marshall, Ch. J., say:

> Humanity, acting on public opinion, has established as a general rule that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. * * * Public opinion, which not even the conqueror can disregard, imposes these restraints upon him, and he can not neglect them without injury to his fame and hazard to his power.

The candid judgment of all must concede "that this Republic has no desire to oppress any of the inhabitants of these islands, but earnestly wishes them peace, prosperity, and the largest degree of liberty consistent with the maintenance of individual rights and collective tranquillity."

Can anyone doubt that President McKinley uttered the sentiments of the nation when, at Boston, in February, 1899, he said:

> No imperial design lurks in the American mind. That would be alien to American sentiment, thought, and purpose. Our priceless principles undergo no change under a tropical sun. If we can benefit these people, who will object? If in years they are established in government under law and liberty, who will regret our perils and sacrifices; who will not rejoice in our heroism and humanity? I have no light or knowledge not common to my countrymen. I do not prophesy. The present is all absorbing to me, but I can not bound my vision by the blood-stained trenches

around Manila, where every red drop, whether from the veins of an American soldier or a misguided Filipino, is anguish to my heart; but by the broad range of future years, when the group of islands, under the impulse of the year just passed, shall have become the gems and glories of these tropical seas, a land of plenty and of increasing possibilities, a people redeemed from savage indolence and habits, devoted to the arts of peace, in touch with the commerce and trade of all nations, enjoying the blessings of freedom, of civil and religious liberty, of education and of homes, and whose children and children's children shall, for ages hence, bless the American Republic because it emancipated and redeemed their fatherland and set them in the pathway of the world's civilization.

And that—

The treaty now commits the free and unfranchised Filipinos to the guiding hand and liberalizing influence, the generous sympathies, the uplifting education, not of their American masters, but of their American emancipators.

The *forms*, the ways and means, the governmental agencies by which this Republic will carry out its benevolent purposes and discharge its duties in regard to these islands and their inhabitants, are matters addressed to the discretion of the Congress and are not understood to be within the purport of the inquiries upon which this report is made.

II.

The decisions of the Supreme Court of the United States regarding the acquisition and government of new territory by the United States established two propositions beyond controversy:

1. The United States as a sovereign nation may acquire and govern new territory.

2. The government of territory acquired and held by the United States belongs primarily to Congress and secondarily to such agencies as Congress may establish for that purpose.

As to these two propositions, the Supreme Court of the United States say:

These propositions are so elementary and so necessarily follow from the condition of things arising upon the acquisition of new territory that they need no argument to support them. They are self-evident. (*Mormon Church* v. *United States*, 136 U. S., 43.)

It is, however, necessary to examine the character and extent of the power of Congress in the matter of such government and legislation. In 1810 the Supreme Court of the United States said:

The power of governing and legislating for territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments. (*Sere* v. *Pitot*, 6 Cranch, 332, 336, 337.)

In *United States* v. *Gratiot et al.* (14 Pet., 526, 537) the court say:

The Constitution of the United States (article 4, section 3) provides "that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the Territorial governments rest. In the case of *McCulloch* v. *The State of Maryland* (4 Wheat., 422) the Chief-Justice, in giving the opinion of the court, speaking of this article, and the powers of Congress growing out of it, applies it to Territorial governments; and says

all admit their constitutionality. And again, in the case of the *American Insurance Company* v. *Canter* (1 Peters, 542), in speaking of the cession of Florida under the treaty with Spain, he says that Florida, until she shall become a State, continues to be a Territory, of the United States Government, by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words "dispose of" can not receive the construction contended for at the bar. * * * The disposal must be left to the discretion of Congress.

In *Gibson* v. *Choteau* (13 Wall., 92, 99) the court say:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.

This must certainly be the rule so long as the territory remains *unorganized;* that is, so long as it remains simply a part of the public domain or property of the United States, which has not had conferred upon it the character of a State or a Territory with the rights appertaining to such political entities.

The reason for this is that the territory is acquired by the United States in the exercise of sovereign powers. As Jefferson said of Louisiana, "This territory was purchased by the United States in their *confederate capacity.*"

The territory when so acquired is held and governed by the sovereign power of the nation, until such time as the political branch of the Government, i. e., Congress and the Executive, shall determine whether our tenure be temporary or permanent, and if permanent, what form and character of local government shall be conferred thereon.

(See authorities above cited.)

Also *Snow* v. *United States* (18 Wall., 317, 320); *Benner* v. *Porter* (9 How., 235, 242); *Murphy* v. *Ramsey* (114 U. S., 15, 44); *National Bank* v. *Yankton* (101 U. S., 129, 133); *Mormon Church* v. *United States* (136 U. S., 1, 42).

The sovereign powers of the people of the United States are not limited by the restrictions placed by that sovereign on the instruments and agents by which certain of the functions of the Government maintained by that sovereign are performed.

The sovereign powers existed before the nation was formed. The founding of the nation assembled these sovereign powers, and the question arose as to how these powers and what ones should be distributed. The distribution was at first attempted by the Articles of Confederation. The practical workings under such distribution proved unfatisfactory, and redistribution was made by the adoption of the Constitution. But not all the powers of the sovereignty belonging to sovereign people of the United States were delegated to and distributed among the agencies of government established by the Constitution.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. (Ninth amendment.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (Tenth amendment.)

In the redistribution of sovereign powers made by the people of the United States "in order to form a more perfect Union," and evidenced by the Constitution, it was provided that in all internal and domestic relations the States should continue to exercise all sovereign powers not specifically granted to the General Government. There-

fore, where the power is not conferred by the Constitution the General Government has no authority in matters arising from internal and domestic relations. But in international relations the reverse is true; the General or National Government exercises every sovereign power not expressly prohibited by the Constitution, for the reason that the National Government in our international relations represents the sovereign people; the States have no international standing, powers, or existence.

Under the laws of civilization all sovereign nations have equal rights and equal powers in the broad field of international relations. Their domestic constitutions and varied restrictions are not known.

In the Chinese Exclusion Case, our Supreme Court say:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. (*The Chinese Exclusion Case*, 130 U. S., 581, 604.)

In *Lane County* v. *Oregon*, the Supreme Court, speaking by Chief-Justice Chase, say (7 Wall., 71–76).

> The people of the United States constitute one nation under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.
>
> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved.

In the case *In re Neagle* (135 U. S., 1) Mr. Justice Lamar (with whom concurred Mr. Chief-Justice Fuller) dissented from the decision of the court that the killing of Terry was "an act done in pursuance of a law of the United States" (p. 40). In discussing the foreign relations of the United States Mr. Justice Lamar said (pp. 84–85):

> The Federal Government is the exclusive representative and embodiment of the entire sovereignty of the nation in its united character; for to foreign nations and in our intercourse with them, States and State governments and even the internal adjustment of Federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

These sovereign powers are to be exercised by that branch of our Government charged with the maintenance of the international relations of the United States, to wit, Congress and the Executive.

In the *Legal Tender Cases* (12 Wall., 554) Justice Bradley said:

> The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in *the Government of the United States*, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. * * *
>
> The United States is not only a Government, but it is a National Government, and

the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. * * *

Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the Government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence.

Probably no more important case was ever submitted to the Supreme Court of the United States than *McCulloch* v. *State of Maryland* (4 Wheat., 315). Probably nothing has done more to make the name of Marshall great than the famous opinion which he delivered in that case. With what realizing sense of the importance and far-reaching effect of their action the court entered upon the determination of the questions presented is shown by the opening words of the opinion (p. 400):

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

Regarding the character and scope of the legislative power of Congress, the opinion declares (p. 411):

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the Government of the United States, or in any department thereof." The counsel for the State of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect, but is really restrictive of the general rgiht, which might otherwise be implied, of selecting the means for executing the enumerated powers. In support of this proposition they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws; that without it doubts might be entertained whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each House may determine the rule of its proceedings; and it is declared that every bill which shall have passed both Houses, shall before it becomes a law, be presented to the President of the United States. The seventh section describes the course of proceedings by which a bill shall become a law, and then the eighth section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each House to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature endowed with legislative powers can legislate is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed is drawn from that peculiar

language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the Government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary can not exist without the other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the tenth section of the first article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the General Government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and in its construction the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future times, execute its powers, would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

If we apply this principle of construction to any of the powers of the Government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the Constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress. The right to enforce the observance of law by punishing its infraction might be denied with the more plausibility because it is expressly given in some cases.

Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States" and "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." The several powers of Congress may exist in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office or rob the mail. It may be said with some plausibility that the right to carry the mail and to punish those who rob it is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice; but courts may exist and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the Government and the absolute impracticability of maintaining it without rendering the Government incompetent to its great objects might be illustrated by numerous examples drawn from the Constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned, in order to punish, whence is derived the rule which would reinstate it when the Government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the Government? If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland is founded on the intention of the convention as manifested in the whole clause. To waste time and argument in proving that without it Congress might carry its powers into execution would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove that in the absence of this clause Congress would have some choice of means; that it might enjoy those which, in its judgment, would most advantageously effect the object to be accomplished; that any means adapted to the end—any means which tended directly to the execution of the constitutional powers of the Government—were in themselves constitutional. This clause as construed by the State of Maryland would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: First, the clause is placed among the powers of Congress, not among the limitations on those powers. Second, its terms purport

to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the National Legislature under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been by this clause to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is that if it does not enlarge, it can not be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

In *Prigg* v. *Pennsylvania* (16 Peters, 539) Justice Story, in delivering the opinion of the court, said (p. 610):

It will, indeed, probably be found when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

The case of *Prigg* v. *Pennsylvania* (16 Pet., p. 539), from which the above quotation is made, was one in which the court sustained the institution of slavery. This directs attention to a most interesting epoch in our history. The Constitution ordained as follows (Art. 4, sec. 2):

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

It has always been conceded that this provision of the Constitution did not operate *ex proprio vigore*. Legislation was required to render it effective. Among the objects designated by the Constitution for which Congress could legislate this is not included. (Sec. 8, art. 1.)

Nevertheless, the slaveholding States demanded and secured the passage of the fugitive slave act, approved February 12, 1793. (1 U. S. Stat., 302.) The Federal courts sustained this legislation, and

the opponents of slavery went to work to secure a Congress and an Executive who would exercise the established and conceded power, so as to render this provision of the Constitution nugatory instead of effective. At the same time the question arose of the power of Congress to legislate regarding slavery in the Territories, and the two controversies continued simultaneously, the latter resulting in the Missouri Compromise, a measure equally repugnant to both contestants.

Finally it appeared that the opponents of slavery were on the verge of accomplishing their purpose, and had secured the privilege of exercising this power. Thereupon the slaveholding States appealed to the arbitrament of arms, with the result that the institution over which the controversies were waged was destroyed and the powers of Congress to legislate in regard thereto extended so as to displace the authority theretofore exercised by the sovereign States. (Thirteenth amendment to Constitution.)

The importance of considering this portion of our history arises from the fact that the civil war resulted from the efforts to control a power of Congress implied from a provision of the Constitution restricting the operation of State laws on the individual ownership of a certain species of property and the power given to "make all needful rules and regulations respecting the territory and other property belonging to the United States."

The first territory over which Congress acquired jurisdiction outside of the boundaries of the thirteen original States was what is known as the Northwest Territory. The title to the land constituting this section of our country was then claimed by several of the original States, and such claim was a serious obstacle to the creation of the Confederation of States. Maryland positively refused to ratify the Articles of Confederation until these lands were ceded to the Federal Government. (A similar controversy as to other lands arose at the time of the adoption of our Constitution, or, to speak accurately, the original controversy continued down to 1802, when Georgia surrendered its claims.) But "The Northwest" became the common property, the public territory, of the United States in 1786.

In 1783, it being evident that the General Government would eventually become the owner of "The Northwest," Congress appointed a committee to report a plan for connecting said Territory with the Confederation and providing a temporary government for the inhabitants. Thomas Jefferson was chairman of that committee, and on the day the cession from Virginia was accepted he reported a plan for the government of said Territory, which, after being subjected to important modifications, was adopted on April 23, 1784. The plan adopted was known as "Jefferson's ordinance," or the "Ordinance of 1784." The plan proved unsatisfactory, and Congress proceeded to legislate anew on the subject. Between May 1, 1786, and July 9, 1787, three ordinances for the government of the Northwest Territory were reported to Congress. (May 10, 1786; September 19, 1786; and April 26, 1787.) Finally, on July 13, 1787, the ordinance of 1787 was adopted. The convention which formulated our Constitution convened on May 25, 1787, pursuant to a resolution of Congress passed February 21, 1787, and finished its labors September 17, 1787. Therefore Congress was considering the ordinance of 1787 at the very time the convention was deliberating over the Constitution.

The importance of considering the ordinance of 1787 in this investiga-

tion lies in the fact that the statesmen of that period did not accept the doctrine that the guaranties enjoyed by the inhabitants of the States were possessed by the inhabitants of the Northwest Territory, neither by virtue of the Articles of Confederation nor by the fact that they had theretofore been within the jurisdiction of one of the States. The accepted doctrine was that such guaranties and rights must be conferred by Congress. Hence the ordinance contained six "articles of compact between the original States and the people and States in the said Territory."

The first provided that no peaceable person should "ever be molested on account of his mode of worship or religious sentiments." The second guaranteed to the inhabitants "the benefits of the writ of *habeas corpus*, trial by jury, proportionate representation in the legislature, bail (except for capital offenses), moderate fines and punishments, and the preservation of liberty and property." The article concluded with the declaration "that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed." The third article declared "that schools and means of education should forever be encouraged, and good faith should be observed toward the Indians." The fourth declared "that the territory and States formed therein should forever remain a part of the confederacy, subject to the Articles of Confederation and the authority of Congress under them." The fifth provided for the formation in the territory of not less than three nor more than five States, to be admitted "into the Congress of the United States on an equal footing with the original States in all respects whatever, and to be at liberty to form a permanent constitution and State government, republican in form, and in conformity with the Articles of Confederation." The sixth prohibited slavery in the territory, but permitted the capture and return of fugitive slaves from any one of the original States. (Rev. Stats., 1878, pp. 15 and 16.)

The reasons for these "articles of compact" and the purpose of entering into them is plainly stated by Congress in sections 13 and 14 of the ordinance, as follows:

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States at as early periods as may be consistent with the general interest.

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent. (Rev. Stats., p. 15.)

Evidently Congress did not consider the territory and inhabitants privileged and conditioned by the articles of confederation nor entitled to statehood with its attendant benefits as an inherent right.

On September 17, 1787, the proposed Constitution of the United States, as agreed upon by the convention, was signed by all the members present, except Gerry of Massachusetts and Mason and Randolph of Virginia. The president of the convention transmitted the draft to Congress. On September 28, 1787, Congress directed the Constitution so framed to "be transmitted to the several legislatures in order

to be submitted to a convention of delegates chosen in each State by the people thereof, etc."

The date fixed by the convention for commencing the operations of government under the new Constitution was March 4, 1789, and on that date the Constitution had been ratified by eleven of the States and became operative. The subsequent ratifications were, North Carolina, November 21, 1789; Rhode Island, May 29, 1789; Vermont, January 10, 1789. During this period the Constitution had been exhaustively examined and discussed in fourteen States (including Vermont) and throughout the nation. It was not acquiesced in by common consent nor accepted as being possessed of the sacred character now conceded it. Almost every one of its provisions was fiercely assailed, and its supporters were put to their utmost endeavor in its defense. Reference is made to this portion of our history to direct attention to the fact that in 1803 the public mind of the entire nation was familiar with the provisions of our Constitution, imbued with its purposes and spirit, and was competent to determine the extent of its intended operation. In 1803 the United States acquired the province of Louisiana. The treaty of cession contained the stipulation:

> The inhabitants of the ceded territory shall be *incorporated in the Union of the United States*, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess. (Article 3, Treaty with France, 1803.)

As soon as the treaty ceding the country was ratified, Congress authorized the President to take possession of and occupy the territory ceded, and, for the purposes of maintaining a government therein, provided that the military, civil, and judicial powers exercised by the officers of the existing government were to be vested in such persons as the President should appoint. (Act approved October 31, 1803, 2 U. S. Stats., 245.)

The military, civil, and judicial powers exercised by the officers of the existing government were those created by the Spanish law, which had been continued in force by the French. The only change made by Congress in this act was to substitute President Jefferson for the King of Spain and to declare the purposes of said government to be for maintaining and protecting the inhabitants in the free enjoyment of their liberty, property, and religion. As has already been stated, many of the laws continued in force by this act were inimical to the Constitution of the United States, and the rights which Congress declared should be maintained are those guaranteed by the Constitution. If Congress had accepted the doctrine that the Constitution was in force in the ceded territory, the President would not have been clothed with the powers of the King of Spain, nor would Congress have provided for the protection of the rights by legislative enactments.

Regarding the government of territory acquired by the Louisiana purchase, Mr. Jefferson says:

> The territory was purchased by the United States in their confederate capacity, and may be disposed of by them at their pleasure. It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution.

That President Jefferson did not consider the territory and the inhabitants privileged and bound by the Constitution has already been referred to in this discussion.

On March 26, 1804, Congress passed another act providing for the government of this territory. (See 2 Stat., 283, 287.) By this act the country ceded by France was divided in two parts, and all north of the thirty-third parallel of north latitude was formed into a district, to be known as the District of Louisiana. Its government was to be administered by the governor, secretary, and judges of the Indiana Territory, whose respective powers were extended over the district. This practically amounted to attaching the district to the Territory of Indiana for judicial and administrative purposes, but the governor and judges were authorized to *make all laws* that might be conducive to good government in the new district, and it was specified that this included the power to establish inferior courts and prescribe their jurisdiction and duties. Certainly this does not indicate that Congress entertained the view that the inhabitants of said territory possessed an inherent right of self-government, or had secured the right by operation of the Constitution. The act contained further provisions that the laws so made should be consistent with the Constitution and the laws of the United States; that they should not interfere with the free exercise of religion, and that trial by jury should always be allowed. Here again is evidence that Congress did not consider the Constitution in force in said territory.

Said act further provided that all of the territory south of the thirty-third parallel was organized as the Territory of Orleans. The executive power of this Territory was vested in a governor and a secretary. The legislative powers were vested in a governor and a council of thirteen.

In both the Territory of Orleans and the District of Louisiana the laws were to be reported to Congress, and if disapproved were to be of no force. It is to be noted that by this act full legislative powers in both Territories were given to officers in the choosing of whom the people had no voice.

The acts of Congress regarding the establishment of governments in the "Northwest Territory" and the "Louisiana Purchase" are examined at length, for the reason that said legislation has been the basis of all subsequent legislation by Congress regarding the establishment of government in organized Territories of the United States. The governments in the District of Louisiana and the Territory of Orleans were established after the adoption of the Constitution. That the acts of Congress relating thereto contain many provisions which are not in harmony with the Constitution of the United States can not be denied, but the Supreme Court has repeatedly sustained said acts.

Choteau v. *Eckhart*, 2 How., pp. 344, 373.
Permoli v. *Municipality*, 3 How., pp. 589, 609.
Clinton v. *Englebrecht*, 13 Wall., pp. 434–442.

An investigation of the negotiations whereby the Louisiana purchase was effected will show that the purpose of the transaction was to secure possession of the Mississippi River and make it a free highway for the transportation of the products of this country, and secure said products unobstructed passage to the markets of the world as then existing. While the negotiation was pending President Jefferson wrote to Mr. Livingston, our minister at Paris, saying to him:

> There is one spot on the globe, one single spot, the possessor of which is our natural and habitual enemy. That is New Orleans, through which the produce of three-eighths of our territory must pass to market, and from its fertility it will ere long yield more than one-half of our produce, and contain more than half of our inhabitants.

And he further said:

> That if France insisted upon holding New Orleans, her position there was so menacing to the welfare of the United States, then lying almost wholly east of the Alleghany Mountains, that it would compel a treaty, offensive and defensive, between the United States and Great Britain.

Even a cursory examination of these negotiations demonstrates that the great object sought to be obtained by the purchase of Louisiana was to secure industrial and commercial benefits therefrom by unimpeded passage to the world's markets. It was water, not land, that Jefferson sought to secure. The acquisition of territory was a minor consideration. To bring the products of the great West into contact with the markets of the world was the primal object. Water routes were the only means of conveyance known in those days. Railroads were unknown. The products of the West must reach the markets of the world via the mouth of the Mississippi, or not at all. That the products of the West would ever be conveyed over the Alleghany Mountains to the tide waters of the Atlantic was not then dreamed of. The mouth of the Mississippi at that time bore the same relation to the markets of the world, as then existing, as the Philippines bear to-day to the trade of the Orient.

In creating legislation which shall have effect in territory newly acquired by the United States, Congress is required to bear in mind the distinction between the territory itself and the inhabitants. Certain things appertain to the territory alone, certain things to the inhabitants, and others to both combined.

Discussion has already been had of the proposition that the sovereignty and jurisdiction of the United States may attach to territory without extending the territorial boundaries of the nation to include such territory; and that such territory, so long as it remained outside of the territorial boundaries of the United States, was not bound and privileged by the Constitution.

It is likewise true that territory may be under the sovereignty and jurisdiction of the United States and yet not subject to the laws of the United States enacted before said territory was acquired or without reference to said territory. Statutes possess no innate power of expansion. The geographical limits of the statutes of the United States are the national boundaries at the time of the enactment, unless otherwise provided by the act itself. During its national history the United States has acquired more than 3,250,000 square miles of territory on the continent of North America, outside of the boundaries of the original States. Congress has enacted more than one hundred special acts for the purpose of extending over this vast domain, the Constitution and laws of the United States, "*not locally inapplicable*," and Alaska still remains to be dealt with. The Constitution and Federal laws have not been made operative therein, excepting the laws relating to customs, commerce, and navigation. (U. S. Rev. Stats., sec. 1954.) It is unorganized territory governed by and legislated for by special acts of Congress, enacted as circumstances required and conditions justified.

It could not candidly be contended that all territory considered merely as land has an innate, inherent right to the privileges guaranteed by the Constitution or the spirit of our institutions to the territory constituting the United States. For instance, if an American voyager were to discover an uninhabited island which was rich in min-

eral resources, contained large deposits of guano and phosphates, streams teeming with fish, extensive forests of valuable woods, fruits, and nuts, animals with valuable furs and skins, coral, oysters, and pearls in abundance, and should take possession thereof in the name of the United States, would such American citizen be permitted to land these natural products of the island in the United States without other restriction than is imposed on the coasting trade between different parts of the United States? Such is not the accepted doctrine. (See Guano Islands, title 72, Rev. Stats., 1878, p. 1080.)

The action of the discoverer does not benefit the island, except in this, that it affords an opportunity to the political branch of the Government of the United States to attach the sovereignty, dominion, and jurisdiction of the United States to the territory, and thereafter confer upon it such privileges as to the political branch seems just and proper. When the rights of the United States have their inception in conquest and are maintained as such, the result is the same as from discovery. But if the rights of the territory so acquired are made the subject of a stipulation in the treaty of peace terminating the war in which the conquest was made, or in any treaty, the United States becomes bound and the territory to that extent benefited by the terms of the national compact. But the rights of the territory are inchoate and are derived from the treaty. They are guaranteed by the nation's honor, not by the Constitution. The territory itself can not insist upon the fulfillment of the compact. The undertaking is with the previous sovereign. The time and manner of its performance is to be determined by the United States. The territory secured by the conquest of Mexico is an instance in point. The United States based its title to Upper California and New Mexico on conquest, but in order to effect a peace bound itself by treaty stipulations that the territory so acquired should be incorporated into the union of the United States. (9 Stat., 930.)

If the purpose of this treaty stipulation was to secure the eventual admission of the conquest as a State, the obligation has been in part discharged by the admission of California and is yet existing as to New Mexico.

New Mexico has been made an organized Territory, and now seeks admission as a State; but the claims presented by the Territory are founded on the fact that its population is sufficient and of such character, and its internal development advanced to such degree, that the time has arrived for it to receive the privileges agreed upon in the treaty with its former sovereign. It appeals to the discretion of Congress; not to the fixed principles or unvarying provisions of the Constitution.

Whatever incipient right to statehood exists in favor of New Mexico, comes from the treaty of 1848, and not from the Constitution.

It is true that in expressing his views on the Dred Scott case, Chief Justice Taney announced the doctrine that the United States could acquire territory for no other purpose than to convert into States of the Union, and that all territory acquired by the United States was charged with a trust requiring ultimate admission as a State. The language used by Chief Justice Taney is as follows:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any

way, except by the admission of new States. That power s plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. But no power is given to acquire a territory to be held and governed permanently in that character. * * *

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. (*Dred Scott* v. *Sandford*, 19 How., 393–446, 447.)

The doctrine thus announced by Chief Justice Taney, that the United States could acquire territory only for the purpose of creating States, was accepted by the court as then constituted. Whether the language quoted is mere *dictum*, as is often asserted, or was the vital point in that case, as is now contended, is not essential in this investigation for the following reason: That doctrine rests upon the proposition that the authority of the United States to acquire territory is derived solely from the power to create and admit new States, which power is conferred upon Congress by section 3 of article 4 of the Constitution. The Dred Scott case is the only case in which this proposition has ever been accepted. What is popularly supposed to have led to its acceptance in that case is matter of history, not of law. It is sufficient for the purposes of this investigation to call attention to the fact that Chief Justice Taney's major premise was in direct contravention of the doctrines established by the prior decisions of the court and by the course of Congressional action, and has been ignored and completely overthrown by the subsequent decisions of the court, to say nothing of the tremendous results of the civil war.

The right of the United States to acquire territory was at first held to arise from the power conferred upon Congress by the Constitution—

1. To carry on war. (Clause 11, Sec. 8, Art. I.)

And the power conferred upon the President and Senate—

2. To make treaties. (Clause 2, Sec. 2, Art. II.)

Finally, the court, the Congress, and the nation recognized that the United States is a sovereign nation, and that the right to acquire territory is an inherent attribute of sovereignty, and thereupon this right of the United States was declared to rest upon the abiding foundation—

3. The sovereignty of the United States.

American Ins. Co. v. *Canter*, 1 Peters, 511, 541.
Mormon Church v. *United States*, 136 U. S., 42.
United States, Lyon et al., v. *Huckabee*, 16 Wall., 414, 434
Jones v. *United States*, 137 U. S., 202, 212.

That the doctrine announced by Chief Justice Taney in the Dred Scott case was in direct contravention of the understanding and course inaugurated by the founders of our Government and thereafter followed by Congress, is manifest from an examination of the national compact with the Northwest Territory (1787), the Louisiana Purchase treaty (1803), the treaty with Spain regarding Florida (1819), the treaty with Mexico regarding Upper California and New Mexico (1848), and Alaska (1867).

One of the articles of the national compact with the Northwest Territory (1787) contained the following pledge:

There shall be formed in the said territory not less than three nor more than five States. * * * And * * * such State shall be admitted * * * on an equal footing with original States, in all respects whatever; and shall be at liberty to form a permanent Constitution and State government. (See Rev. Stat. U. S., p. 16, article 5.)

Why was this compact entered into, if the territory was already charged with a trust in favor of statehood, and the United States without authority to acquire it for any other purpose?

In the treaty for the cession of Louisiana the United States obligated itself that—

The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States. (Article 3, 8 U. S. Stat., 202.)

In the treaty with Spain whereby was confirmed the title of the United States to the Floridas the United States obligated itself that—

The inhabitants of the territories * * * shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. (Article 6, 8 Stat., 256.)

In the treaty with Mexico whereby Mexico relinquished its rights to Upper California and New Mexico the United States obligated itself that—

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and to be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution. (Article 9, 9 Stat., 930.)

In the treaty with Russia whereby the United States acquired title to Alaska the United States obligated itself that—

The inhabitants of the ceded territory * * * should be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. (Article 3, 15 Stat., 542.)

For what purpose and to what end were these treaty stipulations created, if by the *act of acquisition* the territory became charged with a trust in favor of statehood and the United States required by its Constitution to execute said trust?

The doctrine announced in the Dred Scott decision was not original with Chief Justice Taney. It was originated by John C. Calhoun and announced by him during the discussion of the Wilmot proviso in 1847. Regarding its origin Thomas H. Benton says:

A new dogma was invented to fit the case—that of the transmigration of the Constitution (the slavery part of it) into the Territories, overriding and overruling all the antislavery laws which it found there, and planting the institution there under its own wing, and maintaining it beyond the power of eradication either by Congress or the people of the Territory. Before this dogma was proclaimed efforts were made to get the Constitution extended to these Territories by act of Congress. Failing in those attempts, the difficulty was leaped over by boldly assuming "that the Constitution went of itself"—that is to say, the slavery part of it. In this exigency Mr. Calhoun came out with his new and supreme dogma of the transmigratory function of the Constitution in the ipso facto, and the instantaneous transportation of itself in its slavery attributes, into all acquired Territories.

And as to the doctrine itself, Benton says:

History can not class higher than as the vagary of a diseased imagination this imputed self-acting and self-extension of the Constitution. The Constitution does nothing of itself—not even in the States, for which it was made. Every part of it requires a law to put it into operation. No part of it can reach a Territory unless imparted to it by act of Congress. (Benton's Thirty Years in the Senate, vol. 2, pp. 713, 714.)

The conclusion seems irresistible that the sovereign people of the United States, in acquiring territory by the exercise of the inherent right of sovereignty, secure said territory free and clear of incumbrances other than it sees fit to impose upon itself by treaty stipulation or other agreement entered into with direct reference to said territory. A different conclusion can only be reached by conceding that the sovereign people of the United States, acting in a sovereign capacity, are not possessed of the powers which constitute sovereignty. The sovereign people of the United States, while acting as a political unit, possess every attribute of the most potential sovereignty.

Cohens v. *Virginia*, 6 Wheat., 264.
McCulloch v. *Maryland*, 4 Wheat., 405.
Lane Co. v. *Oregon*, 7 Wall., 71, 76.
Legal Tender Cases, 12 Wall., 533.
The Chinese Exclusion Case, 130 U. S., 581, 604.
In re Neagle, 135 U. S., 1, 84-88. (Dissenting opinion of Fuller, Ch. J., and Lamar, J.)

While the court have declared these powers, so exercised, to be of broad extent and of exclusive character, they have not omitted to refer to certain limitations thereto and restrictions thereon.

In *Mormon Church* v. *United States* (136 U. S., 42) the court say:

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints, and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting these Territories. Having rightfully acquired said Territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the conditions of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident.

After thus declaring the powers of Congress the court further say (p. 44):

Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are *formulated* in the Con-

stitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

The case of Thompson *v.* Utah was decided by the court as now constituted, and therein the court, quoting from Mormon Church *v.* United States, again say (170 U. S., 343, 349):

Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are *formulated* in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.

Attention is directed to the use by the court of the expression "*formulated* by the Constitution," rather than created, conferred, or guaranteed by the Constitution, showing that the court had reference to "fundamental limitations" on legislative powers arising from the primal, inherent rights of men—rights which do not arise from constitutional provisions and antedate all governments, such as life, liberty, acquisition of property, formation of a family and begetting offspring, and other rights of like character. Such rights are not created or conferred by governments. They are protected, maintained, and promoted by all just governments, and their exercise regulated and controlled, and in proper individual instances taken away, but it is not the *right*, it is the *regulation* which originates with government. When we undertake to consider such rights in the abstract, we rise above constitutions and statutory enactments, and enter the realm of ethics, and must deal with the laws of civilization and the spirit engendered by nineteen Christian centuries.

All the powers of the Government of the United States are limited and controlled by these higher laws, for the reason that the sovereign, i. e., the people of the United States, recognize their controlling power, and if an officer exercises his discretion in violation thereof, the sovereign displaces him and secures an incumbent whose discretion coincides therewith. Not even the Constitution is exempt. For instance, the Constitution plainly confers upon Congress the right to "grant letters of marque and reprisal." (Art. 1, sec. 8.) Had a citizen of the United States, during the late war with Spain, applied to Congress for such letters, asserting his claim as one of right guaranteed by the Constitution, would the letters have been issued? If not, why? The interrogatory is best answered by the language of Chief Justice Marshall when he says:

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

In investigating the status of the inhabitants of territory newly acquired by the United States, title to which is based upon conquest, it is necessary to bear in mind the difference between political privileges and personal rights.

Political privileges, in the sense in which the term is used at this point of this discussion, are created and conferred by the political

laws, i. e., the laws fixing and regulating the relations between the citizen and the sovereign. The personal rights to be considered are those inherent to man, such as "life, liberty, and the pursuit of happiness." The most sacred of these is life. Let that right be taken, for an example. Sacred as is the right to life, it is suspended in the presence of war. Conquest results from invasion, invasion from war. Time was when war meant extermination, invasion death to the inhabitants, and conquest slavery. Civilized nations no longer put the inhabitants of invaded territory to the sword, although at one time it was done by Divine command. Why was the practice abandoned? Was it because the American colonies issued the Declaration of Independence? Was it in compliance with the requirements of the Constitution of the United States? Or is the restraint enforced by the laws of civilization and the spirit of the age? Are not the Declaration of Independence and the Constitution of the United States as powerless to enforce this restraint as the command of Moses is to remove it?

In dealing with the inhabitants of newly acquired territory, it is the spirit of the Constitution, the character of our institutions, and the laws of humanity and civilization that impose restraints, in the absence of treaty stipulations in regard thereto.

The Supreme Court of the United States say:

> The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the Government with which they are connected. The new and old members of the society, mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.
>
> When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame and hazard to his power. (*Johnson* v. *McIntosh*, 8 Wheat., 543, 589.)

In *Brown* v. *United States* (8 Cranch, 110), the court say (122, 123):

> Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will.

Substantially the same thing was said in *Young* v. *United States* (97 U. S., 39, 60). The language of the court in that case was:

> All property within any enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war, and if it is hostile property subject to capture.

But in another case, that of Mrs. Alexander Cotton (2 Wall., 404, 419), the Supreme Court say:

> This rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions.

See also *Briggs* v. *United States* (143 U. S., 346, 356), wherein the court quote with approval the decisions above referred to.

It will be noticed that in none of these cases does the court suggest that the limitations on this sovereign power are created by the Constitution of the United States.

It is with reference to these higher laws and most potent spirit that the Supreme Court say:

> The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government. (*Murphy* v. *Ramsay*, 114 U. S., 15, 44-45.)

And also (to quote a third time):

> Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. (*Mormon Church* v. *United States*, 136 U. S., 1., 44; *Thompson* v. *Utah*, 170 U. S., 343, 349.)

Alaska is an existing instance of unorganized territory belonging to the United States and governed directly and entirely by Congressional legislation.

Regarding the powers of Congress in legislating for Alaska, Dawson, J., said:

> Possessing the power to erect a Territorial government for Alaska, *they could confer upon it such powers, judicial and executive, as they deemed most suitable to the necessities of the inhabitants.* It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska *the power to legislate and make laws.* In the absence, then, of any law-making power in the Territory, to what source must the people look for the laws by which they are to be governed? This question can admit of but one answer. Congress is the *only* law-making power for Alaska. (*United States* v. *Nelson*, 29 Fed. Rep., pp. 202, 205, 206.)

In Endleman *v.* United States, speaking of the powers of Congress in legislating for Alaska, the court say (86 Fed. Rep., 456):

> Congress has full legislative power over the Territories, unrestricted by the limitations of the Constitution. (Syllabus.)

In the body of the opinion the court said (p. 459):

> The United States, having rightfully acquired the territory, and being the only Government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State. * * * It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people.

This case was decided by the United States circuit court of appeals, ninth circuit, February 28, 1898.

Speaking with reference to the government of *organized* Territories and their inhabitants, the Supreme Court say:

> Their people do not constitute a sovereign power. *All* political authority exercised therein is *derived* from the *General Government.* (*Snow* v. *United States*, 18 Wall., 317, 320.)

It will be noticed that the source of the designated authority is declared by the court to be the "General Government," not the Constitution. This decision is a clear recognition of the sovereign power vested in the General Government, and which is exercised independent of the Constitution.

If this is the rule as to organized Territories, peopled as they have been by immigration from the older communities of the nation, by our

own citizens who at home possessed the rights of citizenship and participated in the sovereignty, many of whom entered the Territory to avail themselves of special privileges bestowed upon them by the nation in recognition of their valor in defense of the nation, is a more advantageous rule to be applied to unorganized territory, largely peopled by an alien race, ignorant of our laws, customs, and institutions, unable to distinguish the difference between the Constitution of the United States and a map of the country, and as incapable, at present, of properly applying its complex provisions and diverse agencies as they would be those of the switchboard of a union railway station?

It therefore seems incontrovertible that the unorganized territory of the United States is not bound and benefited by the Constitution and laws of the United States until Congress has made appropriate provision therefor. And if Congress shall by appropriate action extend the territorial boundaries of the United States to include the islands acquired by the nation during the late war with Spain, and thereafter continue said islands in the condition of unorganized territory governed by the sovereign powers of the nation, the exercise of said sovereign powers will not be directed, limited, or controlled by the expressed provisions of the Constitution.

All the functions of government being within the legislative discretion, Congress may exercise them directly or through organized agencies for local rule.

"All the discretion which belongs to the legislative power is vested in Congress" (114 U. S., 44), and therefore "the power of Congress over the territories is general and plenary." (136 U. S., 42.)

III.

Congress having determined to change unorganized territory belonging to the United States into organized territory and invest it with the powers of government known as Territorial, is Congress thereupon and thereafter under obligation to provide laws and a government for it which shall fulfill all the guarantees of political independence and rights of citizenship which are provided for by the Constitution of the United States for citizens domiciled within the territorial boundaries of the United States? In other words, does the Constitution, *ex proprio vigore*, extend over said Territory?

Throughout our entire history Congress has adhered to the doctrine that the great powers and appurtenant rights created and conferred by the Constitution were not inherent to all people, but were to be bestowed upon them, the bestowal to be made upon those only who possessed the ability and determination to properly exercise them. Hence the requirements of the naturalization laws.

Congress and the Executive are to judge of the fitness of the applicants for such bestowal and the tests by which they are to be tried. Hence the authority to enact the Chinese, Contract Labor, and Pauper Exclusion acts. Hence the right to fix the time when organized Territories shall be admitted into the Union as States and the people thereof acquire the sovereign rights of a State. Acting upon the theory that the Constitution did not *ex proprio vigore* extend over the territory of the United States outside of the boundaries of the several States, Congress has given force and effect to the Constitution and laws of the

United States in the organized Territories by legislative enactment. The act to establish a Territorial government for New Mexico (1850) contained the following provision:

SEC. 17. *And be it further enacted*, That the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States. (9 Gen. Stats. of U. S., chap. 49, p. 452.)

Similar legislation has been had in regard to other organized Territories, as follows: Utah, vol. 9, Stat. L., p. 458, chap. 51, sec. 17; Colorado, vol. 12, p. 176, chap. 59, sec. 16; Dakota, vol. 12, p. 244, chap. 86, sec. 16; Idaho, vol. 12, p. 813, chap. 117, sec. 13; Montana, vol. 13, p. 91, chap. 95, sec. 13; Wyoming, vol. 15, p. 183, chap. 235, sec. 16; District of Columbia, vol. 16, p. 426, chap. 62, sec. 34.

Finally in the "Act to revise and consolidate the statutes of the United States," approved June 22, 1874, Congress made general provision as follows:

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the *organized* Territories, and in every Territory *hereafter organized* as elsewhere in the United States. (Revised Statutes of the United States, sec. 1891.)

The expressions "organized Territories" and "every Territory hereafter organized" appearing in this statute, refers to the political subdivisions known as Territories, in which Territorial governments have been or may be organized. (See title 23, chaps. 2 and 3, Rev. Stats.) It can not be interpreted to mean unorganized territory considered as an expanse of country, nor can "every Territory hereafter *organized*" be held to mean every foot of land hereafter *acquired*. (See title 23, chap. 3, p. 342, Rev. Stats., U. S.)

When the various new States were admitted into the Union their territory and inhabitants derived the benefits and were subjected to the obligations of the Constitution by virtue of the act of admission, which invariably contains the provision that said State is "admitted into the Union on an equal footing with the original States in all respects whatever."

The opinion of Chief Justice Marshall in Loughborough *v.* Blake (5 Wheat., 317) is often cited as sustaining the doctrine that the Constitution is in force *ex proprio vigore* in the Territories. The name of Marshall is one to conjure with; and when he speaks regarding the Constitution it behooves a person desiring an understanding of that instrument "to write his sayings in a book."

The case of Loughborough *v.* Blake was an action of trespass, to try the right of Congress to impose a direct tax on the District of Columbia. Chief Marshall stated the issue as follows:

This case presents to the consideration of the court a single question. It is this: Has Congress a right to impose a direct tax on the District of Columbia?

In answering this question affirmatively, Chief Justice Marshall said (pp. 318–319):

The eighth section of the first article gives to Congress the "power to lay and collect taxes, duties, imposts, and excises," for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It, consequently, extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "But all duties, imposts, and excises shall be uniform throughout the United States." It will not be contended that the modification of the power extends to places

to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our Great Republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

What was it extended "to all places over which the Government extends?" Clearly it was "the power to impose taxes." The power of taxation is a sovereign right of Government. One of those rights which Marshall was eager to establish belonged to the General or Federal Government.

That the Chief Justice did not intend to declare the Constitution to be in force in the District of Columbia appears clearly when the facts upon which the action was founded are known.

The law assailed by the taxpayers was a special act imposing a direct tax upon the District *alone*. That is, the act did not impose a tax upon the country at large and simply require the District to pay a share proportionate with that of the several States. The taxpayers directed attention to the following provisions of the Constitution:

> The Congress shall have power to lay and collect taxes. (Sec. 8, clause 1, Art. I.)
>
> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. (Sec. 2, clause 3, Art. I.)
>
> No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. (Sec. 9, clause 4, art. I.)

The protesting property owners of the District contended that Congress was not authorized to impose a direct tax except in those parts of the country afforded Representatives in Congress and embraced in the language "the several States which may be included within this Union;" and if this contention was not sustained, and the power of Congress to impose a direct tax extended beyond the States of the Union, the Constitution required that the amount to be raised by such tax "be apportioned among the several States" and not confined to one, to wit, the District of Columbia.

Regarding this contention Chief Justice Marshall said (pp. 322–323):

> We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the Constitution which have been recited.
>
> That the general grant of power to lay and collect taxes is made in terms which comprehend the District and Territories as well as the States is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. The words in which those clauses are expressed import this intention. In thus regulating its exercise a rule is given in the second section of the first article for its application to the respective States. The rule declares how direct taxes upon the States shall be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States and creates no necessity for extending the tax on the District or Territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories, as the words of the second section require that it shall be extended to all the States. They, therefore, may, without violence, be understood to give a rule when the Territories shall be taxed without imposing the necessity of taxing them.

Loughborough *v.* Blake was decided in 1820. In 1828 the American Ins. Co. *v.* Canter (1 Pet., 511) was presented to the court, Chief Justice Marshall presiding. In the course of his argument of that cause, Mr. Daniel Webster, discussing the condition of Florida, then a Territory, said (p. 538):

What is Florida? It is not part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The Territory and all within it are to be governed by the *acquiring power*, except where there are reservations by treaty. By the law of England, when possession is taken of territory, the king, *Jure Coronae*, has the power of legislation until Parliament shall interfere. Congress has the *Jus Coronae* in this case, and Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything—she might have refused the trial by jury, and refused a legislature. She has given a legislature to be exercised at her will.

Mr. Whipple, who was associated with Mr. Webster in the case, said (p. 533):

Much argument has been used in order to show that the Constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States.

How the Constitution became of force in Florida has not been shown. Was it by the act of cession? Is there any principle in the *law of nations* which, upon the act of cession or conquest, gives to the ceded or conquered country a right to participate in the privileges of the Constitution of the parent country? The usages of nations from the period of Grecian colonization to the present moment, are precisely the reverse. Such a right never was asserted.

The Constitution was established by the people of the United States *for* the United States. It provides for the future admission of Territories into the Union, and expressly confers upon Congress the power of governing them *as Territories* until they are admitted as States.

If the Constitution is in force in Florida, why is it not represented in Congress? Why was it necessary to pass an act of Congress extending several of the laws of the United States to Florida? Why did Congress designate particular laws, such as the crimes act, the slave trade, and revenue acts, and introduce them as laws into Florida? Why enumerate particular rights secured to the people of the United States, if the inhabitants of Florida were entitled to them upon the act of cession?

This case was heard in the circuit court by Mr. Justice Johnson, of the Supreme Court. He delivered his opinion in writing. Therein he said (see note, 1 Pet., 517):

It becomes indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States, and give a correct construction to the second section of the act of Congress, of May the 26th, 1824, respecting the Territorial government of Florida. Correct views on these two subjects will dispose of all the points that have been considered in argument.

And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the State or Territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty.

The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the Government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of Congress of March 30, 1822, section 9, we have an enumeration of the acts of Congress, which are to be held in force in the territory; and, in the tenth section an enumeration, in nature of a bill of rights, of privileges, and immunities, which could not be denied to the inhabitants of the territory, if they came under the Constitution by the mere act of cession.

As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the Constitution on this subject.

At the time the Constitution was formed the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted, in part, of organized States, and, in part, of territories, the absolute property and dependencies of the United States. These States, this Territory, and future *States* to be admitted into the Union, are the sole objects of the Constitution. There is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is uncontrolled by treaty. By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory.

The United States Supreme Court affirmed the decision of Mr. Justice Johnson. The court, speaking by Chief Justice Marshall, say (1 Pet., 541–542):

The course which the argument has taken will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provisions: "The inhabitants of the territories which his Catholic Majesty ceded to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived the possession of it is unquestioned. In execution of it Congress, in 1822, passed "An act for the establishment of a Territorial government in Florida;" and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the Territorial legislature enacted the law now under consideration.

The vital question in American Insurance Company *v.* Canter was the power of Congress to authorize the Territorial legislature to confer

jurisdiction of cases in admiralty upon Territorial courts. It was insisted that the Constitution gave exclusive jurisdiction of such matters to the Federal courts (art. III, sec. 2.); that the Constitution was in force in Florida, and therefore the acts of the Territorial legislature giving jurisdiction in admiralty cases to the Territorial courts was in violation of the Constitution.

It was against this proposition that Mr. Webster and Mr. Whipple contended, and in such contention were sustained by the Supreme Court.

It was this proposition which was denied by Mr. Justice Johnson, sitting as circuit justice, and the denial affirmed by the Supreme Court.

As to this proposition, the court say (p. 546):

It has been contended that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior courts as Congress shall, from time to time, ordain and establish." Hence, it has been argued that Congress can not vest admiralty jurisdiction in courts created by the Territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges of both the Supreme and inferior courts shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State government.

We think, then, that the act of the Territorial legislature, erecting the court by whose decree the cargo of the *Point a Petre* was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

Twenty years later Daniel Webster was again called upon to refute the doctrine against which he had successfully contended in this case. The forum was the Senate of the United States, and the occasions were his famous debate with John C. Calhoun and his reply to Hayne. It was by reason of showing the fallacy of this dogma that he gained the name "Expounder of the Constitution," and was adjudged worthy to rank with Chief Justice Marshall himself.

The question of extending the Constitution and laws of the United States to Upper California and New Mexico upon the acquisition of that territory from Mexico gave rise to a heated debate in Congress. That debate is described by Benton, then a Senator, in chapter 182, vol. 2, page 729, of his famous work, "Thirty Years in the United States Senate," as follows:

The treaty of peace with Mexico had been ratified in the session of 1847–48, and all the ceded territory became subject to our Government and needing the immediate establishment of territorial governments; but such were the distractions of the slavery question that no such governments could be formed nor any law of the United States extended to these newly acquired and orphan dominions. Congress sat for six months after the treaty had been ratified, making vain efforts to provide government

for the new territories, and adjourning without accomplishing the work. Another session had commenced and was coming to a close with the same fruitless result. Bills had been introduced, but they only gave rise to heated discussion. In the last days of the session the civil and diplomatic appropriation bill—the one which provides annually for the support of the Government, and without the passage of which the Government would stop—came up from the House to the Senate. It had received its consideration in the Senate, and was ready to be returned to the House, when Mr. Walker, of Wisconsin, moved to attach to it, under the name of amendment, a section providing a temporary government for the ceded territories and extending an enumerated list of acts of Congress to them. It was an unparliamentary and disorderly proposition, the proposed amendment being incongruous to the matter of the appropriation bill, and in plain violation of the obvious principle which forbade extraneous matter, and especially that which was vehemently contested from going into a bill upon the passage of which the existence of the Government depended. The proposition met no favor; it would have died out if the mover had not yielded to a Southern solicitation to insert the extension of the Constitution into his amendment, so as to extend that fundamental law to those for whom it was never made, and where it was inapplicable and impracticable. The novelty and strangeness of the proposition called up Mr. Webster, who said:

"It is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us, and especially that we should seek to get some conception of what is meant by the proposition, in a law 'to extend the Constitution of the United States to the Territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that. The Constitution—what is it? We extend the Constitution of the United States by law to territory! What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by law extend these rights, or any of them, to a Territory of the United States? Everybody will see that it is altogether impracticable. It comes to this, then, that the Constitution is to be extended as far as practicable. But how far that is is to be decided by the President of the United States, and therefore he is to have absolute and despotic power. He is the judge of what is suitable, and what is unsuitable, and what he thinks suitable is suitable and what he thinks unsuitable is unsuitable. He is *omnis in hoc*, and what is this but to say, in general terms, that the President of the United States shall govern this Territory as he sees fit till Congress makes further provision.

"Now, if the gentleman will be kind enough to tell me what principle of the Constitution he supposes suitable—what discrimination he can draw between suitable and unsuitable which he proposes to follow, I shall be instructed. Let me say that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States, and over nothing else. It can not be extended over anything except over the old States and the new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty is extended by force of the Constitution itself over every new Territory. That proposition can not be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of the *habeas corpus* would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory."

It was not Mr. Walker, of Wisconsin, the mover of the proposition, that replied to Mr. Webster; it was the prompter of the measure that did it, and in a way to show immediately that this extension of the Constitution to Territories was nothing but a new scheme for the extension of slavery. Denying the power of Congress to legislate upon slavery in Territories—finding slavery actually excluded from the ceded territories and desirous to get it there—Mr. Calhoun, the real author of Mr. Walker's amendment, took the new conception of carrying the Constitution into them, which, arriving there, and recognizing slavery, and being the supreme law of the land, it would override the antislavery laws of the territory and plant the institution of slavery under its ægis and above the reach of any territorial law or law of Congress to abolish it. He therefore came to the defense of his own proposition, and thus replied to Mr. Webster.

"I rise, not to detain the Senate to any considerable extent, but to make a few remarks upon the proposition first advanced by the Senator from New Jersey, fully indorsed by the Senator from New Hampshire, and partly indorsed by the Senator from Massachusetts, that the Constitution of the United States does not extend to the Territories. That is the point. I am very happy, sir, to hear this proposition thus asserted, for it will have the effect of narrowing very greatly the controversy between the North and the South as it regards the slavery question in connection with the Territories. It is an implied admission on the part of those gentlemen that if the Constitution does extend to the Territories the South will be protected in the enjoyment of its property—that it will be under the shield of the Constitution. You can put no other interpretation upon the proposition which the gentlemen have made than that the Constitution does not extend to the Territories. Then the simple question is, Does the Constitution extend to the Territories, or does it not extend to them? Why, the Constitution interprets itself. It pronounces itself to be the supreme law of the land."

When Mr. Webster heard this syllogistic assertion, that the Constitution being the supreme law of the land, and the territories being a part of the land, *ergo* the Constitution being extended to them would be their supreme law; when he heard this he called out from his seat: "What land?" Mr. Calhoun replied, saying:

"The land; the Territories of the United States are a part of the land. It is the supreme law, not within the limits of the States of this Union merely, but wherever our flag waves—wherever our authority goes, the Constitution in part goes, not all its provisions certainly, but all its suitable provisions. Why, can we have any authority beyond the Constitution? I put the question solemnly to gentlemen; if the Constitution does not go there, how are we to have any authority whatever? Is not Congress the creature of the Constitution; does it not hold its existence upon the tenure of the continuance of the Constitution; and would it not be annihilated upon the destruction of that instrument, and the consequent dissolution of this confederacy? And shall we, the creature of the Constitution, pretend that we have any authority beyond the reach of the Constitution? Sir, we are told, a few days since, that the courts of the United States had made a decision that the Constitution did not extend to the Territories without an act of Congress. I confess that I was incredulous, and am still incredulous that any tribunal, pretending to have a knowledge of our system of government, as the courts of the United States ought to have, could have pronounced such a monstrous judgment. I am inclined to think that it is an error which has been unjustly attributed to them; but if they have made such a decision as that, I for one say that it ought not and never can be respected. The Territories belong to us; they are ours; that is to say, they are the property of the thirty States of the Union; and we, as the representatives of those thirty States, have the right to exercise all that authority and jurisdiction which ownership carries with it."

Mr. Webster replied with showing that the Constitution was made for the States, not Territories; that no part of it went to a Territory unless specifically extended to it by act of Congress; that the Territories from first to last were governed as Congress chose to govern them, independently of the Constitution and often contrary to it, as in denying them representatives in Congress, a vote for President and Vice-President, the protection of the Supreme Court; that Congress was constantly doing things in the Territories without constitutional objection (as making mere local roads and bridges) which could not be attempted in a State. He argued:

"The Constitution, as the gentleman contends, extends over the Territories. How does it get there? I am surprised to hear a gentleman so distinguished as a strict constructionist affirming that the Constitution of the United States extends to the Territories without showing us any clause in the Constitution in any way leading to that result, and to hear the gentleman maintaining that position without showing us any way in which such a result could be inferred increases my surprise. One idea further upon this branch of the subject. The Constitution of the United States extending over the Territories, and no other law existing there! Why, I beg to know how any government could proceed, without any other authority existing there than such as is created by the Constitution of the United States? Does the Constitution of the United States settle titles to land? Does it regulate the rights of property? Does it fix the relations of parent and child, guardian and ward? The Constitution of the United States establishes what the gentleman calls a confederation for certain great purposes, leaving all the great mass of laws which is to govern society to derive their existence from State enactments. That is the just view of the state of things under the Constitution. And a State or Territory that has no law but such as it derives from the Constitution of the United States must be entirely without any State or Territorial government. The honorable Senator from South Carolina, conversant with the subject as he must be from his long experience in different branches of the

Government, must know that the Congress of the United States have established principles in regard to the Territories that are utterly repugnant to the Constitution.

"The Constitution of the United States has provided for them an independent judiciary; for the judge of every court of the United States holds his office upon the tenure of good behavior. Will the gentleman say that in any court established in the Territories the judge holds his office in that way? He holds it for a term of years and is removable at Executive discretion. How did we govern Louisiana before it was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one. And I do not believe that there is any new light now to be thrown upon the history of the proceedings of this government in relation to that matter. When new territory has been acquired it has always been subject to the laws of Congress, to such laws as Congress thought proper to pass for its immediate government, for its government during its Territorial existence, during the preparatory state in which it was to remain until it was ready to come into the Union as one of the family of States."

All this was sound constitutional law, or, rather, was veracious history, showing that Congress governed as it pleased in the Territories independently of the Constitution, and often contrary to it, and consequently that the Constitution did not extend to it. Mr. Webster then showed the puerility of the idea that the Constitution went over the Territories because they were "*land*," and exposed the fallacy of the supposition that the Constitution, even if extended to a Territory, could operate there of itself and without a law of Congress made under it. This fallacy was exposed by showing that Mr. Calhoun, in quoting the Constitution as the supreme law of the land, had omitted the essential words which were part of the same clause and which couple with that supremacy the laws of Congress made in pursuance of the Constitution. Thus:

"The honorable Senator from South Carolina argues that the Constitution declares itself to be the law of the land, and that therefore it must extend over the Territories. 'The land,' I take it, means the land over which the Constitution is established, or, in other words, it means the States united under the Constitution. But does not the gentleman see at once that the argument would prove a great deal too much? The Constitution no more says that the Constitution itself shall be the supreme law of the land than it says that the laws of Congress shall be the supreme law of the land. It declares that the Constitution and the laws of Congress passed under it shall be the supreme law of the land."

The question took a regular slavery turn, Mr. Calhoun avowing his intent to be to carry slavery into the Territories under the wing of the Constitution, and openly treating as enemies to the South all that opposed it. Having taken the turn of a slavery question, it gave rise to all the dissension of which that subject had become the parent since the year 1835.

* * * * * * *

This attempt, pushed to the verge of breaking up the Government in pursuit of a newly invented slavery dogma, was founded in errors too gross for misapprehension. In the first place, as fully shown by Mr. Webster, the Constitution was not made for Territories, but for States. In the second place, it can not operate anywhere, not even in the States for which it was made, without acts of Congress to enforce it. This is true of the Constitution in every particular. Every part of it is inoperative until put into action by a statute of Congress. The Constitution allows the President a salary; he can not touch a dollar of it without an act of Congress. It allows the recovery of fugitive slaves; you can not recover one without an act of Congress. And so of every clause it contains. The proposed extension of the Constitution to Territories, with a view to its transportation of slavery along with it, was then futile and nugatory until an act of Congress should be passed to vitalize slavery under it. So that, if the extension had been declared by law, it would have answered no purpose except to widen the field of the slavery agitation, to establish a new point of contention, to give a new phase to the embittered contest, and to alienate more and more from each other the two halves of the Union. But the extension was not declared. Congress did not extend the Constitution to the Territories.

The proposal was rejected in both Houses; and immediately the crowning dogma is invented that the Constitution goes of itself to the Territories without an act of Congress, and executes itself, so far as slavery is concerned, not only without legislative aid, but in defiance of Congress and the people of the Territory. This is the last slavery creed of the Calhoun school and the one on which his disciples now stand—and not with any barren foot. They apply the doctrine to existing Territories and make acquisitions from Mexico for new applications. It is impossible to

consider such conduct as anything else than as one of the devices for "*forcing the issue with the North,*" which Mr. Calhoun, in his confidential letter to the members of the Alabama legislature, avows to have been his policy since 1835, and which he avers he would then have effected if the Members from the slave States had stood by him.

The "irrepressible conflict" regarding slavery is ended. It is no longer a political issue. Therefore it is as proper as it is necessary to consider the effects of that conflict upon the legislation and judicial determinations of the period in which it was the all-absorbing question. Contemporaneous history is the light by which laws and their judicial interpretations are to be read.

Historically we know that the slaveholding population of the United States and their supporters, relying upon the fact that, ordinarily, emigration moves along the parallels of latitude, confidently expected that the territory acquired by the United States during the war with Mexico would be occupied by a people who believed in slavery. The discovery of gold in California changed the ordinary course of emigration and inundated California with a wave of immigration composed of people from all lands and to whom slavery was a hateful institution.

Then commenced the fierce struggle to secure protection, in this territory, for the rights of the slaveholders by Congressional enactment; two scenes in which are graphically described by Mr. Benton in language already quoted.

Baffled in the attempt to secure the desired action by Congress at the first session in 1848, the supporters of the "peculiar institution" had recourse to action by the Executive as a branch of the political department of this Government. The action had was taken during the interim between the first and second sessions of the Thirtieth Congress. James K. Polk was President; James Buchanan, Secretary of State; William L. Marcy, Secretary of War; R. J. Walker, Secretary of the Treasury. These are great names in the history of politics and jurisprudence in our country, and when their action is confirmed by the Supreme Court of the United States a prospective critic may well pause for consideration and deliberation as he adjusts his shaft. But it is well known that these men were the leaders of a great army of partisans, striving to preserve the institution of human slavery which, from our early history, had been a prolific source of contention and a menace, even in that early day, to the establishment and continued existence of our Government. In 1848 it was the "burning question," with regard to which political lines were drawn, and the heat engendered was so intense as to kindle the flames of war. While these men were great, they were also human, and could no more resist the influences of their political environment than they could alter the existing climatic conditions.

Upon the failure of the Thirtieth Congress (1848-49) at its first session to act in the matter of extending the Constitution and laws of the United States over California, the Executive took the initiative. The treaty of peace with Mexico, which also designated the boundary between Mexico and the United States, was ratified May 30, 1848. Official notice of the treaty was not received by the commander of our forces in California until August 7, 1848. On August 9, 1848, Colonel Mason, then in command in California, proclaimed the treaty and announced that the military government then in charge of the civil affairs of the territory would continue in authority until other provision was made, but that the tariff of duties for the collection of

military duties would immediately cease, and that the revenue laws and tariff of the United States would be substituted in its place, and the change was made. Colonel Mason reported his action to the authorities at Washington and his action was confirmed by them.

The Thirtieth Congress adjourned in August, 1848. In the closing days of that session Congress passed two acts from which it appears, by inevitable intendment, that both Houses of Congress assented to the extension of the boundaries of the United States to include Upper California. The first of these was "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending * * * *and for other purposes*," approved August 12, 1848. This act provided:

> For the expenses of running and marking the boundary line between the United States and Mexico, and paying the salaries of the officers of the commission, a sum not exceeding fifty thousand dollars. (9 Stat., Chap. 166, p. 301.)

The second act was "An act to establish certain post routes," approved August 14, 1848. Section 3 of this act provided as follows:

> Sec. 3. *And be it further enacted*, That the Postmaster-General be, and he is hereby, authorized to establish post-offices and appoint deputy postmasters at San Diego, Monterey, and San Francisco, and such other places on the coast of the Pacific, in California, within the territory of the United States, and to make such temporary arrangements for the transportation of the mail in said territory, as the public interest may require; that all letters conveyed to or from any of the above-mentioned places on the Pacific, from or to any place on the Atlantic coast, shall be charged with forty cents postage; that all letters conveyed from one to any other of the said places on the Pacific shall pay twelve and a half cents postage; and the Postmaster-General is authorized to apply any moneys received on account of postages aforesaid to the payments to be made on the contract for the transportation of the mails in the Pacific Ocean; and the Postmaster-General is further authorized to employ not exceeding two agents in making arrangements for the establishment of post-offices and for the transmission, receipt, and conveyance of letters in Oregon and California, at an annual compensation not exceeding that of the principal clerks in the Post-Office Department.
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> Approved August 14, 1848. (9 Stat., Chap. 175, p. 320.)

The position assumed by President Polk and his Cabinet was that by such legislation the stipulations of the agreement between the United States and Mexico, as evidenced by the treaty, had been made operative in the United States and the boundaries of the United States extended to include the territory acquired by conquest confirmed by treaty. See letter of instruction, dated October 7, 1848, from James Buchanan to William V. Vorhies, agent of the Government of the United States in establishing post routes and post-offices in California. (House Ex. Doc. No. 17, pp. 6–7, Thirty-first Congress, first session.)

To this much of the conclusion reached by President Polk and his Cabinet no exception need be taken.

It serves to illustrate, however, the necessity for plain provisions and specific utterances by Congress in legislating for the new possessions of the United States. "Necessary intendment" is too flexible and expansive to form a proper test for the grave questions involved.

But President Polk and his Cabinet saw fit to go further. By letter of date October 9, 1848, William L. Marcy, as Secretary of War, instructed Colonel Mason as follows:

> But the Government *de facto* can of course exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of all the States and Territories of our Union. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of any State or

Territory of the United States; and no such duties can be imposed in any part of the Union on the productions of California; nor can duties be charged on such foreign productions as have already paid duties in any part of the United States.

At the same time R. J. Walker, as Secretary of the Treasury, issued the following circular (see Ex. Doc. No. 1, second sess., Thirtieth Cong.):

TREASURY DEPARTMENT, *October 7, 1848.*

On the 30th of May last, upon the exchange of ratifications of our treaty with Mexico, California became a part of the American Union; in consequence of which various questions have been presented by merchants and collectors for the decision of this Department.

By the Constitution of the United States is declared that "*All treaties* made, or which shall be made, under the authority of the United States shall be the supreme law of the land." By the treaty with Mexico, California is annexed to this Republic, and the Constitution of the United States is extended over that territory and is in full force throughout its limits. Congress also, by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several important particulars the laws of the United States.

Under these circumstances the following instructions are issued by this Department:

First. All articles of the growth, produce, or manufacture of California shipped therefrom at any time since the 30th of May last are entitled to admission free of duty into all ports of the United States.

Second. All articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California.

Third. Although the Constitution of the United States extends to California, and Congress has recognized it by law as a part of the Union and legislated over it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this Department may be unable to collect the duties accruing on importations from foreign countries into California, yet if foreign dutiable goods should be introduced there and shipped thence to any port or place of the United States they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties.

R. J. WALKER,
Secretary of the Treasury.

The authorities in California proceeded to act in accordance with these instructions and enforced in that Territory the tariff and navigation laws of the United States as then existing.

Their action was sustained by the Supreme Court of the United States in Cross et. al. *v.* Harrison (16 How., 164, 189–190, 197), decided in 1853.

The action of President Polk in this matter might have been justified by reasons seemingly incontestable, if based on the fact that the law which imposed a tariff on foreign goods landed in the Territory was put in force by the military government while the United States was exercising the rights of a belligerent; that subsequent changes in the schedules made by the *de facto* government were changes in regulations for the enforcement of an existing law; that such changes lay within the discretion of the military authorities, and therefore the President as Commander-in-Chief of the military forces, and the head of the military government, might adopt the schedules, rules, and regulations of his home Government, if his discretion so determined.

But neither President Polk nor the court based the authority on such grounds. Both placed it on the avowal that the Territory was bound and privileged by the Constitution and laws of the United States, *ex proprio vigore*, upon the acquisition becoming complete.

Congress did not take this view of the matter, and at the second session of the Thirtieth Congress passed "An act to extend the revenue laws of the United States over the Territory and waters of Upper California, and to create a collection district therein," approved March 3, 1849 (9 Stat., chap. 112, p. 400).

That the course pursued by Mr. Polk and his Cabinet, although sustained by the Supreme Court of the United States, was at variance with the ideas entertained by the founders of the Republic plainly appears when compared with the action taken by the First Congress in the instances of North Carolina and Rhode Island. The President informed Congress on the 28th of January, 1790, that North Carolina had ratified the Constitution on November 21, 1789; and, again, he informed Congress on the 1st day of June, 1790, that Rhode Island had ratified the Constitution on May 29, 1789. Prior to receiving these notifications Congress had enacted two revenue measures, to wit, "an act for laying duties on goods, wares, and merchandises imported into the United States," also, "an act imposing duties on tonnage." Although by such act of ratification both North Carolina and Rhode Island became incorporated in the Union of States, Congress saw fit to pass acts extending the provisions of the previous revenue measures over the territory included in North Carolina and Rhode Island. (See 1 Stat., p. 99; 1 Stat., p. 126.)

Louisiana was ceded to the United States in 1803. The Territory of Orleans was erected in a portion thereof in 1804, and in 1812 was admitted into the Union of States as the State of Louisiana. At the time of the cession the tariff law of the United States authorized a reduction of 25 per cent of the rates fixed by the schedules on goods imported in American bottoms. The treaty with France gave a similar reduction to the French and Spanish vessels entering the harbor of New Orleans, thereby giving the French and Spanish imports at that city a lower duty than was imposed elsewhere in the United States. For eight years the Territory of Orleans had an essentially different tariff system from that of any other portion of the United States.

The claims of the United States to Florida were confirmed by Spain in the treaty of 1819. After we had taken possession, the laws regulating the importation of foreign goods into the United States were enforced against the imports from Florida until Congress made our laws operative therein. Commenting upon these and other instances the Supreme Court of the United States say (*Fleming* v. *Page*, 9 How., pp. 616, 617):

> The Treasury Department in no instance that we are aware of since the establishment of the Government has ever recognized a place in a newly acquired country as a domestic port, unless it had been previously made so by act of Congress.

In 1856 came the Dred Scott decision, which has already been reviewed. But that case takes on an added interest at this point of the investigation, because it is the one case in our history where an appeal was taken from the Supreme Court to the sovereign people. The opponents of slavery availed themselves of an "appeal to Cæsar," and their adversary followed the case into the tribunal wherein the sovereign people register decrees.

Two new expounders of the Constitution appeared—Stephen A. Douglas and Abraham Lincoln. A new doctrine was enunciated as

pertaining to the controversy, and a new theorem was declared. Douglas announced the doctrine of "squatter sovereignty," which, in short, was the inherent right of the inhabitants of the Territories to govern themselves and to pass upon their domestic institutions, among which was slavery.

Lincoln announced the theorem, "A house divided against itself can not stand." "This nation will be all slave or all free."

In 1860 the approach of a Presidential election found that diverse views regarding the doctrine that the Constitution was in force in the Territories, *ex proprio vigore*, had divided the people into three great camps.

These views found expression in the national platforms adopted by three conventions. The Democratic convention which nominated Douglas declared:

Inasmuch as differences of opinion exist in the Democratic party as to the nature and extent of the powers of a Territorial legislature, and as to the powers and duties of Congress, under the Constitution of the United States, over the institution of slavery within the Territories;

Resolved, That the Democratic party will abide by the decisions of the Supreme Court of the United States on the questions of constitutional law.

Douglas was the embodiment of the doctrine of squatter sovereignty, and his platform was constructed so as to enable the Democrats who rejected it to support him in the election, and remit the question of the soundness of the doctrine to the Supreme Court.

The Democratic convention which nominated Breckinridge, declared:

1. That the government of a Territory organized by an act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory without their rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation.

2. That it is the duty of the Federal Government, in all its departments, to protect, when necessary, the rights of persons and property in the Territories and wherever else its constitutional authority extends.

The Republican convention nominated Lincoln and declared:

7. *That the new dogma, that the Constitution, of its own force*, carries slavery into any or all of the Territories of the United States is a *dangerous political heresy*, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is *revolutionary in its tendency and subversive of the peace and harmony of the country.*

Upon the issues as joined the sovereign people pronounced decree by electing 180 Lincoln electors out of 303 votes in the electoral college and a Republican majority in both the Senate and the House.

The popular vote stood:

Total for the doctrine (Douglas and Breckinridge)	2,223,068
Total against the doctrine (Lincoln and Bell)	2,457,813
Majority of those opposing	234,475

It is doing a grave injustice to the 1,374,664 supporters of Mr. Douglas to class them all as accepting the doctrine announced in the platform on which Breckinridge was nominated. The delegates who nominated Douglas refused to adopt the views expressed in the Breckinridge platform, and permitted the convention to split in two, rather than subscribe to such a doctrine.

That many persons voted for Douglas in hopes that the plan outlined in his platform would avoid a threatened war is also well known, and

the course pursued by the Douglas Democrats when the war came would justify transferring a large majority, if not all, of these votes to the total of "those opposed."

Being defeated in the forum of the people the adherents of this doctrine resorted to rebellion. The discussion was silenced by the clash of arms; the Constitution read anew by the glare of battles. The doctrine and the peculiar institution it was intended and calculated to protect, maintain, and extend was trampled under by the iron hoofs of war.

Lincoln's theorem was exemplified. The house did not fall, but it became "all free."

One plain legal proposition forces itself upon our attention.

If the doctrine under discussion is right, if it is the correct theory of our Government, a grave injustice was perpetrated when the property rights in slaves held by citizens and recognized by the Constitution were destroyed; and as to all such property injured prior to the adoption of the thirteenth amendment, the United States is justly bound to recompense the owners.

If this doctrine is right, the emancipation proclamation is wrong; and "the considerate judgment of mankind and the gracious favor of Almighty God," which Lincoln invoked upon that act, must pronounce it the supreme act of pillage in the history of the world, not even justified by the laws of war, for war is made on sovereignties and not individuals.

The war ended; the armies disbanded; the soldiers returned home to engage in the pursuits of peace; but they found their places in the business world occupied by others. In most instances the soldiers were without capital, and having become accustomed to the turmoil of the camp were little disposed to settle down to the quiet life of town and country. The spirit of the adventurous life they had been living had not died out. At this time the great West was being opened; the Pacific railroads and connecting lines were being constructed; the mineral wealth of the Rocky Mountains was becoming known. Neither capital nor business standing was essential to success. The alluring prospect was not to be resisted, and thousands of the soldiers of the war "went west," and their friends with them. The nation opened its gates and invited the world to partake of its bounty. "Uncle Sam is rich enough to give us all a farm" was the cry the world around. Thereupon the new West was the objective point of a world exodus. The vast foreign element was easily and rapidly assimilated by the nation and eagerly sought for themselves and their children the knowledge necessary and the qualifications required for American citizenship. The former citizens of the Eastern and Middle States were the dominant factor of each community. The new arrivals from foreign lands were their willing disciples in sociology and governmental polity. All this was very gratifying to the nation.

It was inevitable that communities so constituted and conditioned, engaged in developing territory *within* the acknowledged limits of the United States, should receive all possible assistance from Congress and the other departments of the Government in the great work in which they were engaged. Territorial governments were rapidly created, with powers far in excess of any previously conferred. But the change was in the *practice*, not the *principle*. The Territories were still *created* and the powers *conferred*. The nation continued to gov-

ern them by virtue of inherent sovereign right. The doctrine of popular (squatter) sovereignty in the Territories is incompatible with the fundamental conception of the union of States and is thoroughly discredited.

In *Snow* v. *United States* (18 Wall., 319–320), the court say:

The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. It is, indeed, the practice of the Government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt.

In *National Bank* v. *County of Yankton* (101 U. S., 133), the court, speaking by Mr. Chief Justice Waite, say:

All territory within the *jurisdiction* of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the *outlying dominion* of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The *organic law* takes the place of a *constitution* as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has *all the powers of the people of the United States*, except such as have been expressly or by implication reserved in the *prohibitions* of the Constitution. * * * Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what *the people*, under the Constitution of the United States, may do for the States.

The rule herein announced is broad and plain. In legislating for the States Congress exercises only such powers of sovereignty as are conferred upon it by the Constitution. In legislating for the Territories Congress exercises all powers of sovereignty not prohibited by the Constitution.

In *Murphy* v. *Ramsay* (114 U. S., 44–45) the court say:

But in ordaining government for the Territories and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular Territory and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained and to whom by its terms all power not conferred by it upon the Government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.

In *United States, Lyon et al.* v. *Huckabee* (16 Wall., 414, 434) the court say:

All captures in war vest primarily in the sovereign, but in respect to real property, Chancellor Kent says the acquisition by the conqueror is not fully consummated

until confirmed by a treaty of peace or by the entire submission or destruction of the State to which it belonged, which latter rule controls the question in the case before the court, as the confederation having been utterly destroyed no treaty of peace was or could be made, as a treaty requires at least two contracting parties. Power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent and the title vests absolutely in the conqueror. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former Government, or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation or State. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered State, including even debts as well as personal and real property.

In *Talbott* v. *Silver Bow County* (139 U. S., 446) the court, speaking by Mr. Justice Brewer, with reference to a Territory, say:

It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, *all* whose powers are *created* by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization.

If *all* the powers are *created by Congress*, then *none* is derived from the Constitution. None springs from the inherent rights of individuals or communities.

In *Shively* v. *Bowlby* (152 U. S., 48) the court, speaking by Mr. Justice Gray, say:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition.

The legislature of a State in legislating for the municipalities situated in the State and the inhabitants thereof exercises all the powers of sovereignty belonging to the State the exercise of which is not prohibited by the State constitution. Thereby the "inherent rights of man" during our entire history have been exposed to the peril of the unrestricted discretion of State legislatures in the same way as these rights in the Territories are exposed to the discretion of Congress. Possessing this broad discretion, it is certainly safe to say of Congress that in legislating for "territory within the jurisdiction of the United States not included in any State," constituting "the outlying dominion of the United States" (101 U. S., p. 133)—

It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. (*Endleman* v. *United States*, (86 Fed. Rep., 459.)

Is a different rule to be applied to the territory acquired by a conquest made necessary by the emergencies of the war with Spain and to the varied races inhabiting it than is applied to territory constituting an integral part of our domain when the nation was founded? Are the inhabitants of the islands sovereignty in which was ceded by Spain in 1898, after complete conquest, entitled to rights and privileges, immunities and benefits, denied to soldiers of the Republic who live in Oklahoma?

The sovereign power of Congress in governing territory subject to the jurisdiction of the United States, but outside of the limits of the several States, has been discussed by the Supreme Court in a number

of cases involving the right of Congress to establish courts, confer jurisdiction thereon, and regulate procedure therein.

In various ways these Territorial courts have been assailed, the contention being that in their creation Congress exercised the power conferred by Article III, section 1, of the Constitution, and in the exercise of said power Congress was subject to the limitations and restrictions provided in the Constitution.

In *Benner* v. *Porter* (9 How., 235, 242) the court say:

> The distinction between the Federal and State jurisdictions under the Constitution of the United States has no foundation in these Territorial governments, and consequently no such distinction exists either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments and their courts legislative courts Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.
>
> They are not organized under the Constitution nor subject to its complex distribution of the powers of government, as the organic law, but are the creations exclusively of the legislative department, and subject to its supervision and control.

The United States Supreme Court has always adhered to this doctrine.

American Ins. Co. v. *Canter*, 1 Pet., 511, 546.
Clinton v. *Englebrecht*, 13 Wall., 434, 447.
Hornbuckle v. *Toombs*, 18 Wall., 648, 655.
Good v. *Martin*, 95 U. S., 90, 98.
Reynolds v. *United States*, 98 U. S., 145, 154.
McAllister v. *United States*, 141 U. S., 174, 180.

The question has also been presented to the Supreme Court by cases involving the right to trial by jury.

Trial by jury, in the abstract, is not a right, but a means of securing a right. The right involved is justice.

Justice is an inherent, inalienable right of man, which no sovereign may properly refuse. Trial by jury is one of the fixed institutions of the common law, and where the common law prevails, this procedure may properly be said to attain the dignity of a right. That is to say, it is so ingrafted on the common law as to be an essential part thereof. But this is not true of the *civil law*. The common law belongs to the Anglo-Saxon race. It is the creature of their civilization. Centuries of adherence and devotion to its teachings has given it the character of righteousness, if not of right.

The guaranty of trial by jury dates back to Magna Charta, and, with an Anglo-Saxon, no right need seek other source for its vindication. But the Latin races can assert no such title. Whence their claim to the rights secured on Runnymede and guaranteed by Magna Charta? Their adherence and devotion has been given to the civil law. If the manifest result of attempting to administer justice by jury trials would be to defeat the purpose and deny the right of justice, is the sovereignty which is bound to sustain the right to justice, bound to rely on trial by jury? Must the substance be sacrificed to preserve the shadow?

The common law did not attach to the territory acquired by the United States in the late war, upon the act of acquisition. The civil law continued in force, as it did for a time in the territory acquired by the Louisiana purchase, and in a portion of which territory it remains in force to-day in modified form. If the rules of the common law are to become of force in territory acquired by the United States.

in which territory the civil law had prevailed prior to the acquisition, the change must be accomplished by Congress or governmental agencies authorized by Congress to take such action. (See authorities hereinbefore cited.)

In *Thompson* v. *Utah* (170 U. S., 343, 346) the court, speaking by Mr. Justice Harlan, say:

> That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question. (*Webster* v. *Reid*, 11 How., 460; *American Publishing Co.* v. *Fisher*, 166 U. S., 464, 468; *Springville* v. *Thomas*, 166 U. S., 707.)

In view of the provisions of section 1891, Revised Statutes of the United States, and the special acts of Congress, hereinbefore referred to, whereby the Constitution and laws of the United States not locally inapplicable are extended to the Territories, the declaration quoted is incontestable.

The case of *Webster* v. *Reid* (11 How., 437, 460), decided in 1850, arose in the Territory of Iowa. The court, speaking by Mr. Justice McLean, say (p. 460):

> The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable.

The act of the Territorial legislature involved in *Webster* v. *Reid* prohibited trial by jury in matters of fact involved in cases of a certain character. For the reason set forth in the above quotation, the court held, as to the act of the Territorial legislature, that—

> In this respect the act is void (p. 460).

Reynolds v. *United States* (98 U. S., 145) was a criminal action arising in Utah Territory. In that case the court say (p. 154):

> By the Constitution of the United States (Amend. VI) the accused was entitled to a trial by an impartial jury.

This case was decided in 1878. The act to establish a Territorial government for Utah September 9, 1850, chapter 51, section 17, 9 Stat., 458, provided—

> that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah so far as the same or any provision thereof may be applicable.

A subsequent statute made specific provision for trials by jury in the Territories. (Act of April 7, 1874, chapter 80, 18 Stat., 27.) Section 1 of said act closes with this proviso:

> *Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

The case of *American Publishing Co.* v. *Fisher* (166 U. S., 464), decided in 1896, was a common-law action originating in the Territory of Utah. The court held that litigants in common-law actions in the courts of that Territory had a right to trial by jury.

Mr. Justice Brewer, in delivering the opinion of the court, says (p. 466):

> Whether the seventh amendment to the Constitution of the United States, which provides that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute may be a matter of dispute.

He then reviews the decisions and the acts of Congress of 1850 (9 Stat., 458) and 1874 (18 Stat., 27), above referred to, and determines the case as follows (pp. 467–468):

Therefore either the seventh amendment to the Constitution or these acts of Congress, or all together, secured to every litigant in a common-law action in the courts of the Territory of Utah the right to a trial by jury.

The court further held that the seventh amendment required unanimity in finding a verdict as an essential feature of trial by jury in common-law cases.

The rule so announced was adhered to in *Springville* v. *Thomas* (166 U. S., 707, 708.)

The case of *Callan* v. *Wilson* (127 U. S., 540) involved the right of a trial by jury in a criminal proceeding had in the District of Columbia.

In delivering the opinion of the court, Mr. Justice Harlan says (p. 547):

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine and to order him to be imprisoned until such fine was paid. This *precise question* is now, for the first time, presented for determination by this court.

* * * * * * *

The contention of the Government is that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia * * *

Regarding the position taken by the Government, Mr. Justice Harlan, continuing, says (pp. 548, 549):

Upon a careful examination of this position we are of opinion that it can not be sustained without violence to the letter and spirit of the Constitution.

The learned justice then discusses the use of the words "crime" and "criminal prosecutions" in the Constitution and amendments, and the provisions regarding trial by jury, and arrives at the conclusion that the provisions regarding trials by jury were inserted for the purpose, as stated by him (pp. 549, 550):

to have been the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property.

Conceding this to be true, is such right of a higher character than the right of representation in the body empowered to impose taxation?

Is not "trial by jury" a method of procedure in courts established and maintained for the purpose of securing the due administration of justice?

We have seen that the Supreme Court have always adhered to the doctrine that Congress in establishing courts in the Territories and conferring jurisdiction thereon was not bound by the provisions of the Constitution regarding the judicial powers of the United States. Is Congress bound by the provisions regarding procedure, and free as to the character and jurisdiction of such courts?

Continuing, Mr. Justice Harlan says (p. 550):

There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the Constitutional guarantees of life, liberty, and property, especially of the privilege of trial by jury in criminal cases. In the draft of a consti-

tution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the fourth section of Article XI read that "the trial of all criminal offenses (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." (1 Elliott's Deb., 2d ed., 229.) But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct." (Id., 270.) The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offenses committed out of any State." (3 Madison Papers, 1441.)

But does not Mr. Madison refer to *trials had within a State* of offenses committed without the State? That the convention considered the provision as applying to trials within States of offenses so committed seems apparent from the proceedings had with reference thereto, set forth in 3 Madison Papers, 1589, as follows:

Article 3, section 2 (the third paragraph). Mr. Pinckney and Mr. Gerry moved to annex to the end, "and a trial by jury shall be preserved as usual in civil cases."

Mr. GORHAM. The constitution of juries is different in different States, and the trial itself is *usual* in different cases in different States.

Mr. King urged the same objections.

General Pinckney also. He thought such a clause in the Constitution would be pregnant with embarrassments.

The motion was disagreed to *nem. con.*

Continuing, the opinion states:

In *Reynolds* v. *United States* (98 U. S., 145, 154) it was taken for granted that the sixth amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid* (11 How., 437, 460) that the seventh amendment secured to them a like right in civil actions at common law. We can not think that the people of this District have, in that regard, less rights than those accorded the people of the Territories of the United States.

The act of February 21, 1871, establishing a government for the District of Columbia, provided as follows:

Section 34. * * * And the Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States. (16 Stat., 426, chap. 62, sec. 34.)

The right of trial by jury, however high its character, is an acquired right, not an inherent one, such as life and liberty. If it is acquired by and through the Constitution, it can not be acquired where the Constitution is not in force. If the right of trial by jury in the Territories is derived from the Constitution, the right was in abeyance until Congress extended the Constitution over the Territory. (See authorities hereinbefore referred to.) Would not a like rule apply in the instance of the District of Columbia?

If the right of trial by jury is one of the inherent rights of man, it would seem that one of the States in the Union could not properly deprive him of it, and if such deprivation was attempted the General Government would protect a national citizen in the assertion of such right. The Supreme Court of the United States has expressly held:

A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment of the Constitution of the United States to abridge. (*Walker* v. *Sauvinet*, 92 U. S., 90.)

And in criminal cases the holding of that court has been:

The fifth and sixth amendments to the Constitution of the United States (relating to criminal prosecutions) were not designed as limits upon State governments.
Twitchell v. *Commonwealth*, 7 Wall., 321.
Barron v. *The City of Baltimore*, 7 Pet., 243.
Fox v. *Ohio*, 5 How., 434.
Smith v. *Maryland*, 18 How., 71, 76.
Withers v. *Buckley*, 20 How., 90.

In these cases the court hold that the limitations of the Constitution apply to Federal courts only. As has already been shown, the Supreme Court of the United States sustain the doctrine that courts created in Territories are not Federal courts, although created by Congress or by virtue of authority conferred by Congress, and are free from the restrictions and limitations of the Constitution. By parity of reasoning, a like rule would be applied to courts established by Congress in our newly acquired island possessions.

If the right of trial by jury was acquired from a source antedating the Constitution, running through all the history of the Anglo Saxon race, recognized, but not created, by Magna Charta, part and parcel of our civilization and racial inheritance, a different question is presented, for the right then becomes one guaranteed by laws higher than the Constitution, and the right to claim such right is to be determined by the same higher laws. Tested by the requirements of these higher laws, the rights of the citizens of the District of Columbia are as far removed from those of the Latin races in the Philippines as are the degrees of longitude marking their geographical locations.

IV.

THE CONSENT OF THE GOVERNED.

All powers of all governments rest upon the allegiance of the people over whom the government is instituted. Without allegiance there can be no government. Allegiance must not be confounded with citizenship. Allegiance lies back of citizenship. The theory of our form of government is, that allegiance is created by the consent of the individual; while citizenship is created by the consent of the sovereignty. That is to say, allegiance originates with man, citizenship with the government.

The word "allegiance" is derived from the Latin *alligare*, to bind to, and means the tie which binds the individual to the government.

Acquired allegiance is that binding upon a person who was born an alien, but has been naturalized.

Local or actual allegiance is that which is due from an alien while resident in a country in return for the protection afforded by the government.

Natural allegiance is that which results from the birth of a person within the territory and of a sire acknowledging allegiance to the government. (Kent's Com., vol. 2, 42.)

Allegiance may be an absolute and permanent obligation or it may be a qualified and temporary one. The citizen owes the former to his government until by some act he distinctly renounces it, while the alien domiciled in the country owes a temporary allegiance continuing during such residence. (*Carlisle* v. *United States*, 16 Wall., 147, 154.)

Under the feudal law the theory prevailed that a person was bound to give allegiance to the overlord on whose estate he was born, and through his overlord to the king, and through the king to God. This was predicated on the theory that kings ruled by divine right, and that through him such right descended to the overlord. Therefore such allegiance was a duty imposed by the fact of birth, was as binding as allegiance to God, and could not be avoided except with the consent of the overlord and the king. From this arose the system of vassalage, under which men were believed to be attached to the soil on which had occurred the accident of their birth. At the time the eaven of independence was fermenting the spirit of revolution in the American colonies this fundamental dogma of the feudal law was an accepted doctrine. The Tories advanced it in opposition to the arguments for independence. The advocates of independence for the colonies met this appeal by a direct challenge of the divine right of kings to command allegiance, and thereby secure the power to rule or govern. They insisted that a man had the right to dispose of his allegiance as he saw fit. If a man wanted to openly or impliedly acknowledge allegiance to the King of Great Britain he could do so, and if he saw fit to transfer his allegiance, with its attendant power, to another sovereignty, he could do so without securing the permission of his then sovereign.

The fundamental idea of the Declaration of Independence is a denial of the divine right of kings to rule; that is, that kings derived their claims to the allegiance of the governed from God. Hence the declaration that governments derive their just powers "from the consent of the governed." This was a startling doctrine in those days. So deeply rooted was the idea that kings ruled by divine right that it was not to be overturned by the mere declaration of a contrary doctrine, however true. The new doctrine was not universally accepted, even in the colonies. Therefore, to secure the adherence of those who rejected it and the acquiescence of the other nations by whom recognition was desired, the Declaration of Independence entered into an elaborate defense of the proposed change of allegiance by setting forth the many acts of wrongdoing by which the transfer of allegiance was justified upon the ground that the King of Great Britain had forfeited his divine right, if such right ever existed, and that by reason of said forfeiture the people of the colonies

> are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved.

The derivation of powers from the consent of the governed proclaimed in the Declaration of Independence refers to that storehouse of all the powers of all governments, the allegiance of the people constituting the body politic. The declaration that this allegiance must be conferred by the consent of the governed and could not be required by divine right was a direct blow at the foundation stone of the feudal system and the corner stone of all governments then existing.

Attention is directed to the fact that the Declaration sets forth that it is "the just *powers*" which are derived. The Declaration did not mean when uttered, and does not mean now, that after said powers are acquired their subsequent exercise in the matter of enforcing laws created pursuant to said powers should be regulated by the caprices of the "governed," as, for example, that judgment in a criminal action can only be entered by the consent of the accused.

The existence of this distinction enabled the Government of the United States to deny the right of rebellion.

The successful conduct of the Revolution established in our country the principle that the right to transfer his allegiance without the consent of his sovereign is one of the inherent rights of man. But when the founders of this nation came to exercise this right the ideas of the feudal system were so ingrafted in the minds of the people that involuntarily, no doubt, the general plan of the system was preserved, although modified to conform to the vital principle of the new doctrine. A sovereign State was substituted for the over-lord as the primary recipient of the allegiance and a confederation of States for the king. The General Government or confederation of States was, however, more like an elector than a king. The central idea of the confederation was that allegiance was given and was thereafter due to the individual States, and the General Government must look to the States for the allegiance of the people. As citizenship is based on allegiance, it followed that to the States belonged the authority to confer citizenship. When the Constitution was adopted and this Government established, this idea that the allegiance of the people was primarily due to the State was not eliminated. In the course of time it proved a bitter heritage. The idea that a man's allegiance was due to the State from which he derived his citizenship was the shibboleth of the rebellion which plunged this nation in civil war.

Brought to a realizing sense of the dangers of this doctrine and the conditions and institutions constructed thereon, the nation changed the rule by the adoption of the fourteenth and fifteenth amendments to the Constitution, the purpose and effect of which are to confer allegiance upon the General Government and enable the General Government to reciprocally confer citizenship.

The doctrine that a man could transfer his allegiance without the consent of his sovereign being accepted by the United States, our Government proceeded to enact naturalization laws in harmony with said doctrine, and asserted the correlative right to accept the transfer of allegiance without the consent of the previous sovereign. The nations of Europe, founded upon the feudal system, rejected the doctrine and denied the right of the United States to enforce and practice it and continued to assert sovereign powers over prior subjects who had made such transfer. This led to the war between the United States and Great Britain in 1812. The continued adherence to this doctrine has involved the United States in almost ceaseless diplomatic correspondence with foreign nations.

The statute 3, Jac. 1, chap. 4, provided that promising obedience to any other prince, State, or potentate, subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason.

In respect to the naturalization law of the United States, passed in 1795, Lord Grenville wrote to our minister, Rufus King:

> No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part. (2 Am. State Pap., p. 149; *Fitch* v. *Weber*, 6 Hare, p. 51.)

The right of expatriation was the subject of an elaborate opinion by Attorney-General Cushing in 1856. Therein he said:

> The doctrine of absolute and perpetual allegiance, the root of the denial of any right of emigration, is inadmissible in the United States. It was a matter involved

in and settled for us by the Revolution, which founded the American Union. (8 Op. Atty. Gen., p. 139; 9 Op. Atty. Gen., p. 356; Atty. Gen. Black.)

The right of expatriation was declared by Congress to be a natural and inherent one, in this country, by act of July 27, 1868. (15 Stat. 223, chap. 249; secs. 1999, 2000, Rev. Stats.)

While the Government of the United States is thus firmly committed to the doctrine that its powers resting on allegiance are derived from the consent of the governed, it does not require that such consent shall be evidenced by individual declaration, excepting when it decides to confer citizenship by naturalization proceedings. Ordinarily the consent to allegiance is presumed from the fact of residence in the country and participation in the protection and other benefits of organized government. This rule is applied to the native-born inhabitants as well as the inhabitants of newly acquired territory. In regard to this rule Halleck's International Law says (vol. 2, sec. 7, p. 475, Third ed.):

> The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State, and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile*, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided.

Turning to the treaty of peace with Spain (1898), we find that Article IX provides as follows:

> Spanish subjects, natives of the peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.
>
> The civil rights and political status of the native inhabitants of the Territories hereby ceded to the United States shall be determined by Congress.

Clearly, by this stipulation, the United States not only recognized but guaranteed to their furthest limits the rights embraced in the broad term "the consent of the governed."

If in time to come a resident of said territory desires to withdraw his allegiance and bestow it elsewhere, the United States accords him the liberty, requiring only that if he remains within its jurisdiction he shall consent to the due observance and administration of the laws of the land.

This would be the rule in Arcadia and will probably not be superseded by the millennium.

CITIZENSHIP.

Citizenship is not a necessary resultant of an acknowledgment of allegiance. Citizenship is not a price paid by the United States for the allegiance of men. The correlative of allegiance is protection. (*Carlisle* v. *United States*, 16 Wall., 147, 154.) There are many persons within the jurisdiction of the United States from whom allegiance in some form is due who are not citizens of the United States. Many soldiers in our Army, sailors in our Navy, seamen in our merchant marine, travelers, temporary sojourners, Indians, Chinese, convicted criminals, and, in another and limited sense, minors and women belong to this class.

The celebrated case of Martin Koszta illustrates the obligations of the United States Government upon accepting a proffer of allegiance from an alien. Koszta came to the United States and took out his "first papers" under the then existing naturalization laws. These papers contained a declaration of intention to become a citizen of the United States and consisted of a renouncement of his former allegiance and an acknowledgment of allegiance to the Government of the United States. While in Smyrna, Koszta was seized and placed in confinement by order of an Austrian official. The subsequent proceedings are described by Justice Miller as follows:

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the *Hussar*, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülseman, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. (*In re Neagle*, 135 U. S., 64.)

Citizenship under our Government is not a right inherent to all men. If it is, then by what right is it denied to any person applying therefor? Why do we prescribe qualifications for naturalization and deny the privilege to Indians and Mongolians?

Citizenship is conferred by the Government. It carries with it great powers, rights, privileges, and immunities. Therefore the Government exercises its discretion in bestowing it. A man can not confer it upon himself of his own volition or by his act of acknowledging allegiance to this Government. There are but two ways of acquiring citizenship in the United States:

1. Compliance with the naturalization laws.
2. Birth within the territory and allegiance of the United States.

In *Elk* v. *Wilkins* (112 U. S., 94, 101–102) the court, with reference to the fourteenth amendment, say:

This section contemplates two sources of citizenship, and two sources only: Birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evi-

dent meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case as they do to the time of naturalization in the other. Persons not born subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

The treaty with Spain (Paris, 1898) did not attempt to naturalize the inhabitants of the islands acquired by the United States. On the contrary, it provided that the civil rights and political *status* of the inhabitants shall be determined by the Congress (article 9).

It follows that they can become citizens only by a specific act of Congress.

Attention is directed to the fact that the pending bill for Hawaii contains provisions regulating the naturalization of the inhabitants of said islands.

THE RIGHT OF UNRESTRICTED ENTRY INTO THE UNITED STATES.

The inhabitants of the islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess the right of free entry into the United States. That right is appurtenant to citizen-ship. The rights of immigration into the United States by the inhabitants of said islands are no more than those of aliens of the same race coming from foreign lands. The Chinese resident therein will be absolutely excluded under the provisions of the Chinese exclusion acts. (The Chinese Exclusion Case, 130 U. S. 581.)

The Malays as well as the Chinese or Mongolians may be debarred.

Certainly, so long as the political department of this Government elect to treat said islands as being outside the territorial boundaries of the United States, the question of excluding objectionable persons or races is of easy solution. The products of the Territory have no greater rights of entry into the United States than have the inhabitants. The laws of the United States regulating commerce with that Territory have not been altered. Congress has not changed them, and certainly the Executive acting alone can not do so and has not made the attempt to perform such unauthorized function. The laws regulating navigation and coast trading in the United States have not been extended over said Territory and can not be without appropriate action by Congress.

Respectfully submitted.

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The SECRETARY OF WAR.

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